

FILED 2/17/17

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

L&D INVESTMENTS, INC., a West Virginia corporation,
RICHARD SNOWDEN ANDREWS, JR., MARION A.
YOUNG TRUST, CHARLES A. YOUNG, DAVID L. YOUNG
and LAVINIA YOUNG DAVIS, successors of Marion A. Young.

Plaintiffs,

v.

Civil Action No. 13-C-528-2
THOMAS A. BEDELL, Chief Judge

ANTERO RESOURCES CORPORATION,
formerly known as ANTERO RESOURCES
APPALACHIAN CORPORATION, CONSOL
ENERGY, INC., a foreign corporation, CNX
GAS COMPANY, LLC, a foreign limited liability company,
MIKE ROSS, INC., a West Virginia corporation,
ROBERT HITZELBERGER, SWN PRODUCTION
OPERATING, LLC, ENERGY CORPORATION OF
AMERICA, ENERVEST OPERATING, LLC,¹
CHARLES LEE ANDREWS, III, CHARLES LEE
ANDREWS, III, TRUST, CHARLES LEE BARROLL (deceased),
LOUISE B. BARTON, MILLARD K. BEYER (deceased)
JOHN FORSTER COOPER (deceased),
PENELOPE ANNE FORSTER-COOPER,
CAROLINE DONOVAN, EDYTHE T. DONOVAN
(deceased), MARGARET DONOVAN,
PATRICK F. DONOVAN, WILLIAM DANIEL DONOVAN,
NENA DONOVAN LEVINE, LOUISE NICHOLSON,
JESSICA LIBRA OAKLEY, CHARLES H.T. SAUNDERS,
DONALD SAUNDERS (deceased), MARGARET
A. SAUNDERS, DOUGLAS W. SAUNDERS,
PHYLLIS SAUNDERS (deceased), MELISSA P. SMITH,
NANCY KING ANDREWS STETSON TRUST,
JOSEPHINE B. TAYLOR, RICHARD S. THURBER,
HARRY R. THURBER, JR. (deceased), SUSAN W.
THURBER LIVING TRUST, ROBIN TUNSTALL
JOHNSON TUCK, JAMES JOHNSON TUCK, AGENT,
EMMI (EMMA) T. WYATT (deceased), and SNOWDEN
WYATT, or these Defendants' heirs or devisees or
successor trustees or agents.

Defendants.

OMNIBUS ORDER

¹ C&GAS Properties, L.L.C., purported successor of EnerVest Operating, L.L.C.



DIRECTING THE CLERK OF THIS COURT TO FILE OCTOBER 17, 2016
CORRESPONDENCE WITH ACCOMPANYING UNPUBLISHED OPINION

DIRECTING PLAINTIFFS' LEGAL COUNSEL TO FORTHWITH FILE AND MAKE
A PART OF THE RECORD HEREIN ANY RELATED DOCUMENTATION WITH
REGARD TO THE PREVIOUSLY PERMITTED SERVICE BY PUBLICATION IN
KEEPING WITH PLAINTIFF'S PROPOSED NOTICE PLAN UNDER RULE 4(e)

GRANTING RICHARD SNOWDEN ANDREW, JR.'S,
MOTION FOR REALIGNMENT AS PARTY PLAINTIFF

GRANTING MARION A. YOUNG TRUST SUCCESSORS,
DAVID L. YOUNG, CHARLES A. YOUNG AND LAVINIA YOUNG
DAVIS'S, *MOTION TO ADD SUCCESSORS AS NAMED
PLAINTIFFS AND REALIGN THEM AS PARTY PLAINTIFFS*

ANNOUNCING RULINGS UPON PENDING MOTIONS FOR SUMMARY
JUDGMENT. FURTHER RULINGS AND RELATED JUDGMENTS THEREON

Preliminary Discussion of Pertinent Pleadings and Proceedings

In initiating this Civil Action, Plaintiff, L&D Investments, Inc. (hereafter referred to as "L&D"), filed its *Complaint For Declaratory Relief, Quieting Of Title And Other Relief* with Exhibits A through E on December 10, 2013. Therein, it essentially sought *inter alia* declaratory relief that, to-wit: (a) it is the owner of an undivided interest in the identified mineral parcel(s) underlying the subject real property pursuant to Deeds granting it such ownership which are respectively dated March 6, 2013 and March 12, 2013 and recorded in Deed Book 1506 at Pages 1072 and 1056 maintained by the Clerk of the Harrison County Commission; (b) the purported sale of such interest at a tax sale to Defendant, Mike Ross, Inc., is void and null due to being erroneous and unlawful; and (c) pertains and relates to any encumbrances, modifications, charges or taking of benefits from such undivided interest by any person or entity due to being unauthorized and unlawful.

On March 25, 2014, L&D filed its *First Amended Complaint For Declaratory Relief Quieting Of Title And Other Relief* to likewise effect on its original Complaint.

On April 21, 2014, L&D filed its *Second Amended Complaint For Declaratory Relief Quieting Of Title And Other Relief* therein repleading its initial Complaint and First Amended Complaint while seeking additional judgment against Defendant, Antero Resources Corporation (hereafter referred to as "Antero"), or any related entity acting in concert therewith for specified damages and accountings.

On May 9, 2014, Antero filed its *Answer To First Amended Complaint, Counterclaim, And Cross-Claims Against Mike Ross, Inc. And Robert Hitzelberger*. In addition to stating various defenses, Antero asserts such counterclaim against L&D and cross-claims against Defendant, Mike Ross, Inc. (hereafter referred to as "Ross"), and Defendant, Robert Hitzelberger (hereafter referred to as "Hitzelberger") respectively. As such, it seeks *inter alia* declaratory judgment pursuant to *West Virginia Code § 55-13-1* and Rule 57 of the *West Virginia Rules of Civil Procedure* determining ownership interests and declaring the rightful owners of the disputed mineral interests with regard to L&D, Ross and Hitzelberger.

Defendant *Robert Hitzelberger's Answer To First Amended Complaint* was filed on May 15, 2014 therein stating *inter alia* that he has no interest in the surface or mineral rights at issue and that L&D is not entitled to any relief from him. *Robert Hitzelberger's Answer To Defendant Antero Resources Corporation's Cross-Claim And Affirmative Defenses* was also filed on May 15, 2014.

On May 20, 2014, Defendants, Consol Energy Inc. (hereafter referred to as "Consol"), and CNX Gas Company LLC (hereafter referred to as "CNX") filed its *Answer To Plaintiff's First Amended Complaint, Counterclaim, And Cross-Claims Against Mike Ross, Inc. And Robert Hitzelberger*. In addition to stating various defenses, Consol and

CNX likewise assert such counterclaim against L&D and cross-claims against Ross and Hitzelberger. As such, it likewise seeks *inter alia* a declaratory judgment pursuant to *West Virginia Code* § 55-13-1 and Rule 57 of the *West Virginia Rules of Civil Procedure* determining ownership interests and declaring the rightful owners of the disputed mineral interests with regard to L&D, Ross and Hitzelberger.

On May 23, 2014, Defendant, Mike Ross, Inc. (hereafter referred to as "Ross") filed its *Answer, Counterclaim, And Cross-Claims Of Defendant Mike Ross, Inc.* In addition to stating various defenses and demanding dismissal of L&D's First Amended Complaint, Ross asserts *inter alia* a counterclaim against L&D for slander to title alleging that it "has engaged in publication of a false statement derogatory to [Ross's] title with malice." (See Cross-Claim, p. 7-8 at ¶ 9). Ross also asserts cross-claims against Antero, Consol, CNX and Hitzelberger for indemnification and/or contribution, in whole or in part, for any such damages this Court may determine Ross is liable to L&D.

All appropriate and necessary responsive pleadings to these various counterclaims and cross-claims (as well as to L&D's Second Amended Complaint) were filed by the respective parties and are a matter of record.

Pursuant to this Court's notice, various Pre-Trial Memoranda were filed and a Pre-Trial and Scheduling Conference was conducted on June 12, 2014 and resulting in an initial *Pre-Trial and Scheduling Order* being entered on June 13, 2014² controlling the course of further action in this litigation unless modified upon good cause being shown.

² This Order was corrected and amended by Order entered on July 10, 2014 that addressed a scheduling time error. Then, by Order entered May 22, 2015, this Court stayed the remaining deadlines and dates in such Scheduling Order, as amended, and noticed this matter for a scheduling and status conference for July 14, 2015. Following such conferences, this Court caused to be entered a *Pre-Trial And Scheduling Order* on July 28, 2015 as well as an Order addressing such Status Conference proceedings and related rulings.

The joined parties undertook various evidentiary discovery. Discovery disputes were initially taken before the duly appointed Discovery Commissioner, Teresa J. Lyons, Esq., pursuant to provisions contained in such *Pre-Trial and Scheduling Order*. Such disputes as well as other motions by respective parties herein were then appropriately addressed, as necessary, and were either ultimately stipulated to by the parties or ruled upon by this Court as reflected in Orders as entered herein.

As a result of undertaken discovery, related motion pleadings and this Court's granting permission, L&D filed:

1. *Plaintiff's Amended Complaint To Join Additional Parties* on November 5, 2014 with copies of prior pleadings attached as Exhibits 1 through 3.
2. *Plaintiff's Second Amended Complaint Joining Additional Parties* on April 15, 2015 with Exhibit A (copies of prior pleadings and related exhibits) and Exhibit B ("Additional Persons or Entities to be made Defendants") [i.e.: new party Defendants].

As a further result, Ross filed *Defendant Mike Ross, Inc.'s Amended Cross-Claim* on April 15, 2015 stating *inter alia* that it is entitled to declaratory judgment that he owns an undivided 80% interest in the subject mineral parcels underlying the related real property including the interest claimed by Hitzelberger. Furthermore, Ross asserts such purportedly erroneous claim of Hitzelberger constitutes slander of title and his claim of the right to receive royalty income from such interest constitutes tortious interference with Ross's business relationships with the companies producing oil and gas from wells located on such property.

The restated positions of the then variously joined parties herein at the time of the June 14, 2015 conferences, as reflected in their respective Pre-Trial Memoranda and summarized by this Court are:

1. L&D still seeks declaratory judgment and other relief to quiet title as to the subject mineral parcels underlying the related real property at issue herein; necessary accountings and payments of all royalties and other monies and benefits from operations conducted on such; whether such operations (including "pooling" invoked by Antero) were proper; the validity of a 1902 lease (Deed Book 137 at Page 459); other mineral properties (aka "Asbury Unit"); and unlawful taking as an intentional conversion of funds by Defendants holding royalty monies in "suspense" thereby unjustly enriching themselves. (*Plaintiff's Pre-Trial Memorandum* filed July 8, 2015).

2. Antero denies any liability to L&D or that they are, in any way, responsible for its alleged damages in this instant matter as the disputes at issue herein involve property ownership disputes of L&D with other defendants. As such, Antero seeks declaratory judgment of ownership of the mineral interest at issue herein. (*Antero Resources Corporation's Pretrial/Scheduling Conference Memorandum* filed July 8, 2015).

3. Consol and CNX likewise deny any liability to L&D or that they are, in any way, responsible for its alleged damages in this instant matter as the disputes at issue herein involve property ownership disputes of L&D with other defendants. As such, Consol and CNX seek declaratory judgment of ownership of the mineral interest at issue herein. (...*Pretrial/Scheduling Conference Memorandum* filed on July 8, 2015).

4. Ross asserts entitlement to summary judgment that is is the owner of an undivided 80% interest in the subject mineral parcels underlying the related real estate including the interests that it believes are erroneously claimed by L&S, Hitzelberger, Saunders Defendants and all other Defendants except Defendants who derive a

combined undivided 20% interest from Carolyn Thurber Cooley (i.e.: Wyatt, Thurber & Donovan successors).

Ross seeks, to-wit: (a) determination of what undivided interest in the subject mineral parcels it acquired by virtue of the tax deed (See Stipulated Document # 47) ³ it acquired and recorded in 2003 (DB 1349 at Page 1170); (b) particularly, whether it acquired all subject property interests assessed in the name of Charles Lee Andrew, Jr. including the real property interests of co-tenants who were not separately assessed for their undivided interests in real property even though they were erroneously assessed for interests in royalty income; (c) whether Hitzelberger has standing to assert a claim of ownership in the subject mineral parcels or is precluded therefrom under *West Virginia Code § 11-22-7*; (d) whether Ross exercised reasonably diligent efforts to serve notice of right to redeem on the owners of interests in the subject mineral parcels purchased at the 2000 delinquent tax sale; (e) whether any such claims of ownership of undivided interests in the subject mineral parcels thereby conveyed to Ross were extinguished under West Virginia Code § 11A-4-4's statute of limitation; and (f) ultimately all of the ownership interests for the subject mineral parcels identified and at issue herein.

Ross is not pursuing any claim for reimbursement of royalties allegedly paid erroneously to other parties or any other monetary damages. It simply desires establishment of the correct proportionate ownership interests in the subject mineral parcels so that future royalties are paid correctly. (...*Pre-Trial Memorandum* filed July 2, 2015).

³ Such tax deed stipulation includes copies of additional documents, to-wit: *List Of Those To Be Served With Notice To Redeem* (DB 1349 at Pages 1172 - 1175); *Certificate Of Sale* (DB 1349 at Page 1176); *Tax Receipt* (DB 1349 at Page 1177); *Notice To Redeem* (DB 1349 at Page 1178); *Publisher's Certificate* (DB 1349 at Page 1179); and copies of USPS Certified Mail Return Receipts for Charles Lee Andrews, Richard C. Thurber, Emma L. Wyatt, H. L. Thurber, Jr. and Edith T. Donovan.

5. Hitzelberger avers having a clear chain of title for a 20% undivided interest in the mineral parcels underlying the related real estate herein and that he has continuously paid his taxes on such interest as well as received royalties thereon since 1999.

While believing ownership/title issues can be summarily resolved, he further believes a variety of issues may then remain as to Ross's provision of actual notice to purportedly known owners of various interests in the subject mineral parcels underlying the real estate at issue herein. Hitzelberger states these issues' limited resolution or mootness become inextricably interwoven with determinations of ownership interests, in the event Ross's title fails, for properly appearing parties herein with lawful ownership interests of whatever interest remains from the determined chain of title herein based on default, abandonment or inheritance. Additionally, accounting for royalties and other monies from mineral production from the subject property may be necessary. (*Defendant Robert Hitzelberger's Pre-Trial Memorandum* filed on July 9, 2015).

6. Defendant, Energy Corporation of America (hereafter referred to as "ECA"), purports owning a leasehold interest in and the right to operation and production of six (6) natural gas wells on related real estate herein. There being no claims for damages against it or its partial leasehold interest other than to whom it makes royalty payments, ECA's position is that any further ruling Orders entered by this Court involving it will relate only to future payment of royalties by it to the proper parties and their respectively declared ownership interests. (...*Pre-Trial Memorandum* filed on July 6, 2015 and July 7, 2015).

7. Defendant, Enervest Operating, L.L.C. (now properly CGAS Properties, L.L.C.) asserts ownership of a leasehold interest in wells drilled pursuant to leases for

the subject property herein and that it received notice of Ross's ownership resulting from tax sale deed upon which it thereafter paid royalties to Ross. It was joined herein merely because it has an interest as a lessee. There are no claims or cause of action against it regarding ownership of subject mineral parcels or for having paid royalties to Ross. (*Pre-Trial Memorandum*...filed July 6, 2015).⁴

8. Donovan, Levine, Oakley, Thurber and Wyatt Defendants assert specific ownership in the Donovan, Wyatt and Richard S. Thurber Defendants of an undivided interest in the subject mineral parcels at issue herein and as regularly assessed for such upon the Land Books of Harrison County, West Virginia beginning with and since the tax year 2000 without interruption. (...*Pre-Trial Memorandum* filed on July 2, 2015).

9. Saunders Defendants likewise assert ownership of an undivided interest in the subject mineral parcels at issue herein and as regularly assessed for such since the tax year 2000 without interruption and upon which all taxes due have been paid. (...*Pre-Trial Memorandum* filed July 13, 2015).

10. Defendants, Susan W. Thurber Living Trust and Harry R. Thurber, Jr., assert ownership of undivided interest in the subject mineral parcels at issue herein and as regularly assessed for such upon the Land Books of Harrison County, West Virginia beginning with and since the tax year 2000 without interruption. Furthermore, such Trust has been receiving royalty and/or rental income from Aniero and CNX. Finally, these Defendants suggest that such interest may possibly be enlarged or reduced depending on L&D's allegations and subsequent determinations by this Court thereon.

⁴ In *Pre-Trial Memorandum Of Defendant, EnerVest Operating, L.L.C. - CGAS Properties, L.L.C.*, this Court was informed that CGAS Properties, L.L.C. is now the owner of a fractional interest in the leases in dispute in this instant litigation that were formerly owned by Defendant, EnerVest Operating, L.L.C., and that an Agreed Order was anticipated to be presented herein for purposes of substitution. The record in this matter does not appear to reflect any such Order subsequently presented or entered herein.

Summary Judgment Motions and Related Responses

Now, primarily pending before this Court are ten (10) motions for summary judgment having been heretofore filed herein by various parties mostly in timely procedural keeping with its *Pretrial And Scheduling Order* caused to have been entered on July 28, 2015.

These motions and their variously related responsive pleadings have been under extensive long-term review by this Court.⁵ Such pleadings include:

1. *Defendant Mike Ross, Inc.'s Motion For Summary Judgment* with Exhibits A through D filed on March 28, 2016.

In response, to-wit: (a) *Defendant Antero Resources Corporation's Response To Defendant Mike Ross, Inc.'s Motion For Summary Judgment* was filed on April 22, 2016; (b) *Defendant Consol Energy Inc. And CNX Gas Company LLC's Response To Defendant Mike Ross, Inc.'s Motion For Summary Judgment* was filed on April 22, 2016; (c) *Defendants, Charles H.T. Saunders, Donald Saunders (deceased), Margaret A. Saunders, Douglas W. Saunders and Phyllis Saunders (deceased), Response To Defendant Mike Ross, Inc.'s Motion For Summary Judgment* accompanied by *Saunders Defendants' Memorandum In Support Of Their Response To Mike Ross Inc.'s Motion*

This Court also caused to be entered on May 25, 2016 an *Order Order Sua Sponte Suspending Remaining Deadlines And Requirements Under The July 28, 2015 Pre-Trial And Scheduling Order; Staying Further Proceedings; And Generally Continuing Final Pre-Trial Conference And Jury Trial Pending Final Rulings On All Summary Judgment Motions And Until Further Order Of This Court*. While reviewing such motions for summary judgment and related responses in light of the then controlling Pre-Trial and Scheduling Order, this Court further stated *inter alia* therein that it, to-wit:

...recognizes its inability to substantively rule all thereon in a timely nature which would also properly accommodate all parties in consideration of the further required submissions due on or before May 20, 2016... [and that]

...it in the best interests of judicial economy and fundamental fairness to the collective parties herein to make the following determinations, to-wit: (a) to suspend any remaining deadlines and requirements under such *Pre-Trial and Scheduling Order*; (b) stay further proceedings; and (c) generally continue the Final Pre-Trial Conference / Settlement Conference scheduled for June 17, 2016 and Jury Trial scheduled for June 27, 2016.

For Summary Judgment with Exhibits A through E was filed on April 22, 2016; (d) Plaintiffs' ⁶ Response To Defendant Mike Ross, Inc.'s Motion For Summary Judgment with Exhibits 1 through 6 was filed on April 25, 2016; and (e) Defendant Robert Hitzelberger's Response To Mike Ross, Inc.'s Motion For Summary Judgment with Exhibit A was filed on April 26, 2016.

In reply, to-wit: (a) Defendant Mike Ross, Inc.'s Reply To Response To Its Motion For Summary Judgment By Saunders Defendants; (b) Defendant Mike Ross, Inc.'s Reply To Response To Its Motion For Summary Judgment By Plaintiffs L&D Investments, Inc., Richard Snowden Andrews, Jr. And The Marion A. Young Trust; and (c) Mike Ross, Inc.'s Reply To Defendant Robert Hitzelberger's Response To Mike Ross, Inc.'s Motion For Summary Judgment were all respectively filed on May 9, 2016.

2. Motion For Summary Judgment Of Defendants, Susan Thurber Living Trust And Harry R. Thurber, Jr. (Deceased) filed on March 28, 2016.

In response, to-wit: (a) Defendant Mike Ross, Inc.'s Response To Motion For Summary Judgment By Susan W. Thurber Living Trust And Harry R. Thurber, Jr. (deceased) was filed on April 6, 2016 and therein stated no objection thereto while

⁶ The term "Plaintiffs" utilized in such responsive pleading as well as other responsive pleadings to these various Motions refer to the original Plaintiff herein (i.e.: L&D Investments, Inc.) as well as particularly named Defendants herein (i.e.: Richard Snowden Andrews, Jr., Marion A. Young Trust and the successors-heirs of Marion A. Young, they being her children David L. Young, Charles A. Young and Lavinia Young Davis, Marion A. Young's undivided interest in the subject oil and gas mineral parcels underlying the related real estate, at the time of her death and held in trust, being distributed to her children in keeping with Trust proviso and the terms of her Last Will and Testament.

Such parties are also the subject of still pending motions for realignment that were filed herein as part of various responsive pleadings. Being a named party Defendant or identified successors heirs of a named party Defendant herein as a result of their having had a direct chain of title purportedly demonstrating ownership in an undivided interest in the mineral property at issue herein, they now wish to establish such ownership *inter alia* as well as specifically challenge the Tax Deed of Defendant Mike Ross, Inc.

These motions are: (a) Response Of Richard Snowden Andrew, Jr. And Motion For Realignment As Party Plaintiff filed herein on October 1, 2015; and (b) Response of Marion A. Young Trust By Its Successors And Motion To Add Successors As Named Plaintiffs And Realign Them As Party Plaintiffs filed herein on March 16, 2016. Such party realignment motions are ruled upon herein *infra*.

agreeing that such Living Trust owns an undivided 1/20 (5%) ownership interest in the Subject Property that was not conveyed by delinquent tax deed to Defendant, Mike Ross, Inc.; and (b) *Plaintiffs' Response To Various Motions Filed By The Parties* (which includes *inter alia* a "Response to Susan Thurber Living Trust and Harry R. Thurber, Jr. (deceased)" was filed on April 26, 2016 and therein essentially took no position thereon.

3. Defendants *SWN Production Company, LLC And Enervest Operating, LLC's Motion For Summary Judgment* accompanied by *SWN Production Company, LLC And Enervest Operating, LLC's Memorandum In Support Of Motion For Summary Judgment* with Exhibits A through C filed on March 28, 2016.⁷ ("SWN" and "CGAS").

In response, to-wit: (a) *Defendant Mike Ross, Inc.'s Response To Motion For Summary Judgment By SWN Production Company, LLC And EnerVest Operating, LLC* was filed on April 6, 2016 and therein stated that it has no objection thereto as SWN agrees that MRI acquired 80% ownership interest in the identified mineral parcel(s) underlying the subject real property and that any claims against that portion asserted by L&D and certain other parties are barred by the three-year Statute of Limitations; and (b) *Plaintiff's Response To Defendants SWN Production Company, LLC And Enervest Operating, LLC's Motion For Summary Judgment* with Exhibits 1 and 2 was filed on April 26, 2016. L&D et al asserts *inter alia* that such Defendants are properly before this Court as indispensable parties having a property interest that can be adversely affected by rulings of this Court and because they have a duty to pay proper royalties by ascertaining the correct owners of the mineral interests which they developed.

⁷ The record herein reflects that this Motion for Summary Judgment was refiled on March 29, 2016 with Exhibits that were not provided with the March 28, 2016 filing.

In reply, *SWN Production Company, LLC And Enervest Operating, LLC's Reply To Plaintiff's Response To Defendants SWN Production Company, LLC And EnerVest Operating, LLC's Motion For Summary Judgment* was filed on May 6, 2016.

4. *Defendants' Caroline Donovan, Edythe T. Donovan (Deceased), Margaret Donovan, Patrick F. Donovan, William Daniel Donovan, Nena Donovan Levine, Jessica Libra Oakley, Richard S. Thurber, Emmi (Emma) T. Wyatt (Deceased) And Snowden Wyatt Motion For Summary Judgment And Incorporated Memorandum Of Law* was filed on March 28, 2016.

In response, to-wit: (a) *Defendant Mike Ross, Inc.'s Response To Motion For Summary Judgment By Caroline Donovan et al.* was filed on April 6, 2016 wherein it had no objection thereto while essentially agreeing that Defendants Patrick F. Donovan, Richard S. Thurber and Timothy M. Thurber (as Co-Trustees of the Richard S. Thurber Trust) and Snowden Wyatt each own an undivided 1/20 interest in the subject oil and gas property which was not conveyed by delinquent tax deed to Defendant, Mike Ross, Inc.; and (b) *Plaintiffs' Response To Various Motions Filed By The Parties* (which includes *inter alia* a "Response to Donovan, Thurber and Wyatt Defendants' Motion for Summary Judgment") was filed on April 26, 2016 wherein they essentially took no position thereon.

5. *Defendant Antero Resources Corporation's Motion For Summary Judgment* with Exhibits A through F accompanied by *Defendant Antero Resources Corporation's Memorandum In Support Of Its Motion For Summary Judgment* and *Table Of Cases Provided By Antero Resources Corporation Pursuant To T.C.R. 6.04* was filed on March 28, 2016.

In response, to-wit: (a) *Defendant Mike Ross, Inc.'s Response To Motions For Summary Judgment By Defendants Antero Resources Corporation, Consol Energy Inc., And CNX Gas Company LLC* was filed on April 25, 2016; and (b) *Plaintiff's Response To Defendant Antero Resource's Motion For Summary Judgment* with Exhibits 1 through 5 filed on April 26, 2016.

In reply, *Defendant Antero Resources Corporation's Reply In Support Of Its Motion For Summary Judgment* accompanied by *Table Of Cases, Statutes, And Regulations Provided By Antero Resources Corporation Pursuant To T.C.R. 6.04* was filed on May 6, 2016.

6. *Defendant CONSOL Energy Inc. And CNX Gas Company LLC's Motion For Summary Judgment* with Exhibits A through F accompanied by *Defendant CONSOL Energy Inc. And CNX Gas Company LLC's Memorandum In Support Of Their Motion For Summary Judgment* and *Table Of Cases Provided By Consol Energy Inc. And CNX Gas Company LLC Pursuant To T.C.R. 6. 04* was filed on March 28, 2016.

In response, to-wit: (a) *Defendant Mike Ross, Inc.'s Response To Motions For Summary Judgment By Defendants Antero Resources Corporation, Consol Energy Inc., And CNX Gas Company LLC* was filed on April 25, 2016; and (b) *Plaintiff's Response To Defendants Consol Energy, Inc. And CNX Gas Company's Motion For Summary Judgment* with Exhibits 1 through 5 filed on April 26, 2016 (with started reliance being mostly on their Response to Defendant Antero's Motion for Summary Judgment).

In reply, *Defendant CONSOL Energy, Inc. And CNX Gas Company LLC's Reply In Support Of Their Motion For Summary Judgment* with Exhibit 1 and accompanied by *Table Of Cases, Statutes, And Regulations Provided By Consol Energy Inc. And CNX Gas Company LLC Pursuant To T.C.R. 6.04* was filed on May 6, 2016.

7. *Robert Hitzelberger's Motion For Summary Judgment* was filed on March 31, 2016. Therein, he expresses entitlement to summary judgment against Plaintiff, L&D Investment, Inc. and against Defendant, Mike Ross, Inc.'s cross-claim herein.

In response, to-wit: (a) *Defendant Mike Ross, Inc.'s Response To Motion For Summary Judgment By Robert Hitzelberger* with Exhibit A was filed on April 25, 2016; and (b) *Plaintiffs' Response To Various Motions Filed By The Parties* (which includes *inter alia* a "Response to Robert Hitzelberger's Motion for Summary Judgment") was filed on April 26, 2016 wherein they essentially had no response other than stating it does "not dispute Mr. Hitzelberger's entitlement to an undivided 1/5 interest...".

8. *Plaintiff's L&D Investments, Inc., Richard Snowden Andrews, Jr. And The Marion A. Young Trust's Motion For Partial Summary Judgment To Establish Their Ownership And For Declaration That Defendant Mike Ross, Inc.'s 2003 Tax Deed Is Void Or Voidable* with attached document copy ⁸ was filed on April 1, 2016.

Therein, L&D along with Richard Snowden Andrews, Jr. and The Marion A. Young Trust (by her surviving children, Charles A. Young, David L. Young and Lavinia Young Davis) request this Court to: (a) declare that the quitclaim Tax Deed issued to Ross is void and of no force or effect; and (b) quiet title to the subject property by identifying the owners of the subject property. After these determinations have been made, they aver that this Court should then permit the parties to provide it with their positions as to the percentage of undivided ownership interests in the subject mineral parcels underlying the related real estate tracts.

⁸ Such "Separation Of Interest" document is dated May 25, 1999 and pertains to joint ownership of the subject real estate herein as it pertains to named Defendants herein, to-wit: Harry R. Thurber (deceased); Emmi (Emma) Wyatt (deceased); Edythe T. Donovan (deceased); and Richard S. Thurber, while also being "Stipulated Document # 21".

In response, to-wit: (a) *Defendant Antero Resources Corporation's Response To Plaintiff's Motion For Parital [sic] Summary Judgment To Establish Ownership* was filed on April 22, 2016 and simply requests this Court to deny such Motion to the extent that it differs from the chain of title set forth in Antero's motion for summary judgment; (b) *Defendants CONSOL Energy Inc. And CNX Gas Company LLC's Response To Plaintiff's Motion For Parital [sic] Summary Judgment To Establish Ownership* was filed on April 22, 2016 and likewise requests this Court to deny such Motion to the extent that it differs from the chain of title set forth in Antero's motion for summary judgment; and (c) *Defendant Mike Ross, Inc.'s Response To Motion For Summary Judgment By Plaintiffs L&DF Invesiments, Inc., Richard Snowden Andrews, Jr. and the Marion A Young Trust* with Exhibits A through C wherein Ross's averred undivided 80% ownership interest in the O&G is strongly reiterated as well as applicability of the purportedly relevant three-year statute of limitation with no ownership redemption efforts being taken following Ross's Tax Deed recordation in April 2003.

Plaintiffs' Combined Replies To The Defendants' Responses To Plaintiffs' Motions (which includes "I. Reply to MRI's Responses to Plaintiffs' Motion for Partial Summary Judgment to Establish Ownership and Declare MRI Deed Void or Voidable" and "II. Plaintiffs' Reply to Antero's and CNX's Responses to Plaintiffs' Motion for Partial Summary Judgment regarding Ownership") was filed on May 11, 2016 in reply.

9. *Plaintiff's Motion For Summary Judgment Regarding The Counterclaim Of Defendant Mike Ross, Inc.* with Exhibits 1 and 2 as to averred "slander of title" was filed on April 1, 2016.

Defendant Mike Ross, Inc.'s Response To Plaintiff L&D Investments, Inc.'s Motion For Summary Judgment Regarding The Counterclaim Of Defendant Mike Ross, Inc. was filed on April 25, 2016 in response.

Plaintiffs' Reply To Defendant Mike Ross, Inc.'s Response To Plaintiffs' Motion For Summary Judgment On The MRI Counterclaim was filed on May 9, 2016 in reply.

10. *Plaintiff's Motion And Memorandum Of Law For Partial Summary Judgment Regarding Unauthorized Pooling* with Exhibits 1 through 8 was filed on April 1, 2016 purportedly arising from trespass to its mineral property by Defendant, Antero Resources Corporation due to its combining Plaintiff L&D's mineral property in three particular units without any leasing grant of pooling or subsequent modification.

Defendant Antero Resources Corporation's Response To Plaintiff's Motion And Memorandum Of Law For Partial Summary Judgment Regarding Pooling with Exhibits 1 and 2 (Exhibit 1 further having Exhibits A through C) was filed on April 22, 2016 in response.

Plaintiffs' Combined Replies To The Defendants' Responses To Plaintiffs' Motions (which includes "III. Plaintiff's Reply to Antero's Response to Plaintiff's Motion regarding Pooling") was filed on May 11, 2016 in reply.

Other Motions, Pertinent Filings and Outstanding Matters

Additional motions (initially referred to herein *supra* at n.6 on Page 11) still pending in this matter are, to-wit:

1. Defendant, Richard Snowden Andrews, Jr.'s, *Motion For Realignment As Party Plaintiff* filed on October 1, 2015 along with his Response to Plaintiff, L&D Investment, Inc.'s, *Complaint* and *Second Amended Complaint Joining Additional Parties*; and

2. *Motion To Add Successors As Named Plaintiffs And Realign Them As Party Plaintiffs* on behalf of Charles A. Young, David L. Young and Lavinia Young Davis as the lawful heirs and successors to Defendant, Marion A. Young Trust, filed on March 16, 2016 along with their Response to such *Complaint* and *Second Amended Complaint Joining Additional Parties*.

Also filed herein on April 1, 2016 are the *Parties' Submitted Documents Stipulated as Authentic* (and footnoted that "All documents have been stipulated as to authenticity and admissibility except where indicated in the "Objection" column.) which contains copies of ninety-eight (98) identified documents and respectively numbered and indexed by document, submitting party identification, pertinent recording information and objection (if any).

Further received by this Court is correspondence from Plaintiff's legal counsel dated October 17, 2016 with an attached copy of a recent West Virginia Supreme Court case, to-wit: *Littell v. Mullins*, 2016 WL 1735234 (April 28, 2016 Memorandum Decision and unpublished opinion).² Such counsel avers that *Littell* provides determinative guidance on the issue of a tax deed purchaser providing required statutory notice to all co-tenants or co-owners of a mineral parcel notice of the right to redeem.

Having been so received, this Court accordingly hereby **ORDERS** that the Clerk of this Court be and is **DIRECTED** to file such correspondence along with a clean copy of such *Memorandum Decision* generated from Westlaw so that they be made a part of the record herein.

² Defendant, Mike Ross, Inc., discusses such Memorandum Decision (referenced as *Littell v. Mullins and Hicks*, Case No. 15-0364 (4-28-16)) in its *Defendant Mike Ross, Inc.'s Reply To Response To Its Motion For Summary Judgment By Plaintiffs L&D Investments, Inc., Richard Snowden Andrews, Jr. And The Marion A. Young Trust* on Page 13 of 14 therein and which was filed herein on May 9, 2016.

Ross correctly distinguishes that case (as well as *Mason*) from this instant matter insofar as our Supreme Court setting aside a tax deed for any statutory non-compliance when the civil action seeking such relief is filed within the statutory three (3) year period contained in *West Virginia Code § 11A-4-4*.

As reflected in its *Order Regarding Hearing On July 14, 2015* entered on July 29, 2015, this Court found constructive service appropriate herein concerning the newly added Defendants in L&D's amended Complaints joining additional defendants. Accordingly, it directed L&D's legal counsel to submit "a plan for the type and method of constructive service to compel service of process in this case and satisfy due process".

Such matter had been raised by L&D in its *Motion To Permit Constructive Service* filed herein on June 22, 2015 which included a document listing the additionally made Defendants and their respective status as to having been served. This Court's Order entered on July 6, 2015 established Response a deadline of July 14, 2015 for any such Response from any other party herein. None were filed.

This Motion requested an Order permitting constructive service for those individuals who did not receive notice by Certified Mail Return Receipt Requested Restricted to Addressee. This constructive service to be pursuant to Rule 4(e) of the West Virginia Rules of Civil Procedure by publication in the Clarksburg Exponent Telegram and by publication in a general circulation newspaper in London, England, once a week for three successive weeks as some of these individuals' last known addresses believed to be in Great Britain. Additional constructive service was to include sending such Defendants, by First Class Mail, the same publication notice and including a copy of the Summons and Amended Complaint.

L&D's legal counsel filed its *Plaintiff's Proposed Notice Plan Under Rule 4(e) And Brief* on July 29, 2015 with an accompanying *Affidavit In Support Of Service By Publication* and its *Amendment To Plaintiff's Proposed Notice Plan Under Rule 4(e)* filed on July 30, 2015.

On August 19, 2015, L&D's legal counsel filed a *Publisher's Certificate* from The Exponent Telegram dated August 11, 2015 certifying publication of an Order of Publication in this matter on August 3, 2015 and August 10, 2015.

The Defendants whose address or whereabouts are unknown or who otherwise could not be located, as identified and so named in such Order of Publication included: Charles Lee Andrews, III; Charles Lee Andrews, III, Trust; Charles Lee Barroll; Louise B. Barton; Millard K. Beyer; John Forster Cooper; Melissa P. Smith; Nancy King Andrews Stetson Trust; Josephine B. Taylor; Robin Tunstall Johnson Tuck; and Marion A. Young Trust.¹⁰

The record does not reflect there being any *Publisher's Certificate* or like document filed herein by L&D's legal counsel with respect to any Order of Publication having run in a London, England newspaper of general circulation as proposed and allowed. Furthermore, the record does not reflect any additional information filed as to the additional first class mailing to these identified defendants or, alternatively, to "occupants" at the addresses being utilized for such constructive service.

Accordingly, this Court hereby **ORDERS** that Plaintiffs' legal counsel be and is **DIRECTED** to forthwith file and make a matter of record herein such *Publisher's Certificate* or like documentation with regard to the previously permitted service by publication in keeping with plaintiff's proposed notice plan under Rule 4(e) as it may pertain to any Order of Publication being run in such London, England newspaper.

Standard of Review for Summary Judgment and Declaratory Judgment

Rule 56(a) of the *West Virginia Rules of Civil Procedure* states in part that:
"A party seeking to...obtain a declaratory judgment may...move with or without

¹⁰ L&D's legal counsel suggested that such Trusts had likely terminated due to the passage of time and that information had been received that the Marion A. Young Trust, in particular, was terminated.

supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." Furthermore, subsection (c) thereof states in part that, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

As to any required defense by the non-moving party, subsection (e) thereof states in part that, "...an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, ... , must set forth specific facts showing that there is a genuine issue for trial."

Rule 56 is "...designed to effect a prompt disposition of a controversy on the merits without resorting to a lengthy trial, if in essence there is no real dispute as to the salient facts or if only a question of law is involved." *Hanks v. Beckley Newspaper Corp.*, 153 W. Va. 834, 837, 172 S.E.2d 816, 817 (1970). (Citation string omitted).

Accordingly, our West Virginia Supreme Court of Appeals has clearly stated on numerous occasions that, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 160, 133 S.E.2d 770, 771 (1963). (Citation string omitted).

Under this standard, "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). However, "the party opposing...summary judgment must offer

more than a 'mere scintilla' of evidence in support of their allegations: they must produce evidence from which a rational juror could find in their favor." *Id.* at 193.

In other words, "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. pt. 2. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

"If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syl. pt. 3, *Id.*

Herein especially, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation. See *Johnson v. Killmer*, 219 W. Va. 320, 633 S.E.2d 265, 268 (2006).

Summary judgment is particularly appropriate where the nonmoving party has failed to make a sufficient showing on an essential element of the case which he has the burden of proving. See *Hall's Park Motel, Inc. v. Rover Construction, Inc.*, 194 W.Va. 309, 460 S.E.2d 444 (1995). Also see, *Brady v. Deals on Wheels, Inc.*, 542 S.E.2d 457 (2000) where our Supreme Court of Appeals quoted *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985), "A non-moving party cannot create a genuine issue of material fact through a mere speculation or the building of one inference upon another".

"Summary judgment cannot be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for such judgment." Syl. pt. 6, *McCullough Oil, Inc. v. Rzek*, 176 W.Va. 638, 346 S.E.2d 788 (1986); Syl. pt. 3, *Guthrie v. Northwestern Mutual Life Insurance Co.*, 158 W.Va. 1, 208 S.E.2d 60 (1974). Accordingly, general allegations that do not show facts with detail and precision are insufficient to prevent entry of summary judgment for the moving party.

Rule 57 of the *West Virginia Rules of Civil Procedure* states, in whole:

The procedure for obtaining a declaratory judgment pursuant to the West Virginia Uniform Declaratory Judgments Act, Code chapter 55, article 13 [§ 55-13-1 et seq.], shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. A party may demand declaratory relief or coercive relief or both in one action. Further relief based on a declaratory judgment may be granted in the declaratory action or upon petition to any court in which the declaratory action might have been instituted. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

West Virginia Code § 55-13-1 states, to-wit:

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

A declaratory judgment action is a proper procedure for an adjudication of the legal rights and duties of parties to an actual, existing controversy that involves the construction or application of a statute or of statutes. *Arthur v. County Court*, 153 W. Va. 60, 167 S.E.2d 558 (1969). Also see *Mongold v. Mayle*, 192 W.Va. 353, 452 S.E.2d 444 (1994).

The constitutionality of a statute may be determined in a declaratory judgment action. *Nuckols v. Athey*, 149 W.Va. 40, 138 S.E.2d 344 (1964).

Analysis and Discussion

Upon mature consideration of all of which, including the joined parties' plethora of pleadings, pending motions and responses thereon within the record thus far generated by the respective parties, the Court hereby makes the following analysis with additional findings and conclusions.

1. This Court has appropriate subject matter and procedural jurisdiction as well as personal jurisdiction over all necessary parties herein with regard to declaring, as a matter of law, the present ownership interest(s) pertaining to the subject oil and gas mineral parcels underlying the related real estate at issue herein (hereinafter referred to as the "Subject Property") and located in Harrison County, West Virginia as fully identified and described in various pleadings. As such, it is a proper venue for the proceedings conducted herein and has proper legal authority for the relief so being ordered.

2. The central issue in this case is the determination of the present ownership interests of the oil and gas in two adjacent tracts of land, described in deeds as containing 819 acres and 231 acres, on Middle Fork of Sycamore Creek in Union District, Harrison County, West Virginia. (See Stipulated Document Nos. 1 and 2).

3. In order to determine interests in the Subject Property, it is incumbent to review and ascertain to a legal certainty the chain of title for such tracts of land and underlying oil and gas as well as the related oil and gas assessment of such interests as reflected on the Land Books of Harrison County, West Virginia.

4. L&D along with Richard Snowden Andrews, Jr. and The Marion A. Young Trust (by her surviving children, Charles A. Young, David L. Young and Lavinia Young Davis) particularly request:

(a) declaration that the quitclaim Tax Deed issued to Ross is void and of no force or effect; and (b) quieting the title to the subject property by identifying the owners of the subject property. After these determinations are made, this Court should then permit the parties to provide it with their positions as to the percentage of undivided ownership interests in the subject property.

5. Ross particularly avers acquisition of an 80% interest in the subject oil and gas mineral parcels underlying the related real estate tracts by *Quitclaim Deed* (aka "Tax Deed") from the Clerk of the County Commissions of Harrison County, West Virginia, dated April 11, 2003 and recorded in the Office of the Clerk of the County Commission of Harrison County, West Virginia, in Deed Book 1349, at Page 1170. (See Stipulated Document Nos. 17 and 47). Issuance of such "Tax Deed" resulted from Ross's purchase of a delinquent tax lien assessed in the name of Charles Lee Andrews at the 2001 Harrison County Delinquent Tax Sale.

6. Charles Lee Andrews held legal title to all ownership interest in the Subject Property at issue herein from January 8, 1891 until March 2, 1920 as trustee for the benefit of Mary Catherine Lee Andrews. (See Stipulated Document Nos. 3, 5 and 6).

7. Originally, these two (2) tracts of land were owned by Richard Snowden Andrews in 100% fee simple absolute by Deed dated July 14, 1859 and Deed dated October 10, 1889. (See Stipulated Document Nos. 1 and 2).

8. By recorded Deed dated April 4, 1903, he as trustee along with Mary (Catherine) Lee Andrews as widow of R. Snowden Andrews deceased conveyed, as intended, to Jonathan D. Springer all of the surface of such tracts of land as well as all

minerals underlying the same except the oil and gas therein reserved and excepted and the coal theretofore sold and conveyed. (See Stipulated Document No. 5).

9. Ms. Andrews died on March 2, 1920. Under her Will including five (5) codicils (See Stipulated Document No. 6) she devised, to-wit:

(a) An undivided one-fifth ($1/5$ or 20%) interest in these reserved oil and gas mineral parcels underlying these two (2) related tracts of land (i.e.; Subject Property) to each of her surviving children, to-wit; Louisa Lee Andrews (Bacon Eldridge), Carolyn Snowden Andrews (Fahnestock), Charles Lee Andrews (who had served as trustee for her benefit as hereinabove addressed), and George Snowden Andrews and thereby comprising an undivided four-fifths ($4/5$ or 80%) interest.

(b) An undivided one-fifteenth ($1/15$ or 6.666%) interest in the Subject Property to each of her grandchildren, to-wit; Rosalie Tunstall Smith (Foster Cooper), Anita Tunstall Smith and Marion Tunstall Smith (being the surviving children of Ms. Andrew's daughter, Emily Rosalie Andrews Tunstall Smith, who had predeceased her) and thereby comprising in total an undivided one-fifth ($1/5$ or 20%) interest in the Subject Property.

10. As for the undivided one-fifth ($1/5$ or 20%) interest inherited by these three (3) Smith grandchildren, to-wit:

(a) An affidavit of heirship dated June 6, 1986 and duly recorded by John Forster Cooper (son of Rosalie Forster Cooper and nephew of Anita Tunstall Smith) establishes Anita Tunstall Smith dying intestate, single and without issue thereby leaving her her sisters, Rosalie Forster Cooper (f/n/a Rosalie Tunstall Smith) and Marion Tunstall Johnson Tuck (f/n/a Marion Tunstall Smith) as well as her half-sister,

Josephine Tunstall Barrol as her heirs at law. (See Stipulated Document No. 32). As a result:

(i) Rosalie Forster Cooper owned an undivided seven-seventy fifth ($7/75$ or 9.333%) interest in the Subject Property at the time of her death that she bequeathed in equal shares to her three (3) children, to-wit: John Forster Cooper, Anthony Forster Cooper and Catherine Lee Tschappat. (See Stipulated Document No. 7). Thereby, each child inherited an undivided seven-two hundred and twenty-fifth ($7/225$ or 3.111%) interest in the Subject Property.

(ii) Marion Tunstall Smith Johnson Tuck combined interests received from her grandmother and sister passed through in trust and intestate succession eventually to her last remaining heir at law, her son Robin Tunstall Johnson who purportedly passed away in January of 1993. Thereby, his inherited interest became an undivided seven-seventy fifth ($7/75$ or 9.333%) interest in the Subject Property. (See Stipulated Document Nos. 11, 12, 16, 30, 31, 32, 34, 35 and 41).

(iii) Josephine Tunstall Barrol received an undivided one-seventy fifth ($1/75$ or 1.333%) interest in the Subject Property that eventually passed, as part of her residue estate in trust, for her children believed to be Louise Barroll Barton, Josephine Barroll Taylor and Charles L. Barroll (named Defendants herein as Louise B. Barton, Josephine B. Taylor and Charles L. Barroll (deceased))

(iv) The sum total of these inherited interests being an undivided one-fifth ($1/5$ or 20%) ownership interest in the Subject Property at issue herein.

11. As for the derivation of the undivided one-fifth ($1/5$ or 20%) ownership interest in the Subject Property inherited by Carolyn Snowden Andrews (Fahnstock):

(a) Pursuant to Ms. Fahnestock's Will and Codicils probated and recorded in the Harrison County's Clerk's Office on July 28, 1986 at Will Book No. 109 at Page 365 (See Stipulated Document No. 26), she bequeathed such oil and gas interest (i.e.: Subject Property) unto her children, Snowden A. Fahnestock, Gibson Fahnestock and Margaret Fahnestock Drummond Wolff as part of her residuary estate to her executors and/or trustees as established therein.

(b) Snowden A. Fahnestock, Gibson Fahnesstock and Margaret Fahnestock Drummon Wolff, as executors of their Mother's testamentary estate, purportedly executed a Deed granting and conveying unto Harry Parsons Cross "the one-fifth (1/5) undivided interest in and to the oil and gas within and underlying that certain tract or parcel of land, containing 1,041.2 acres, more or less, situate and being on the waters of Sycamore Creek, in Union District, Harrison County, West Virginia, and being one-fifth (1/5) undivided interest in and to the oil and gas, together with the right to enter on said tract or parcel of land and bore for the same, reserved in that certain deed dated the 4th day of April, 1904...". (See Stipulated Document Nos. 29 and 5).

(i) Such purported Deed dated December 1, 1949 and deemed to be in incomplete form and statutory compliance, was not made a matter of record in the Office of County Clerk of Harrison County, West Virginia until August 13, 2014 which was well after the commencement of this civil action.

12. As for the undivided one-fifth (1/5 or 20%) ownership interest in the Subject Property inherited by Louise Bacon Eldridge:

(a) Under her (Louisa Lee Andrews Eldridge) Last Will and Testament and administration thereof, she bequeathed such interest inherited from her mother, Mary Catherine Lee Andrews, to her brother, Charles Lee Andrews, thereby giving him an

undivided two-fifths (2/5 or 40%) ownership interest in the Subject Property. (See Stipulated Document no. 27).

13. As for the undivided one-fifth (1/5 or 20%) interest in the Subject Property inherited by George S. Andrews, to-wit:

(a) Under his (George Snowden Andrews) Last Will and Testament and administration thereof, he bequeathed such interest inherited from his mother, Mary Catherine Lee Andrews, to his niece and nephews, Richard S. Andrews, Charles Lee Andrews, Jr. and Carolyn Thurber Cooley (children of his brother, Charles Lee Andrews). (See Stipulated Document No. 25).

14. As for the combined undivided two-fifths (2/5 or 40%) ownership interest in the Subject Property inherited by Charles Lee Andrews from his mother, Mary Catherine Lee Andrews, and his sister, Louise Bacon Eldridge:

(a) Under his (Charles Lee Andrews a/k/a Charles L. Andrews) Last Will and Testament and administration thereof, he bequeathed such undivided two-fifths (2/5 or 40%) interest in the Subject Property to his children, Richard Snowden Andrews, Charles Lee Andrews, Jr. and Caroline Amelia Walden Andrews Thurber. (See Stipulated Document No. 28).

15. As a result of these testamentary bequests by George S. Andrews and Charles Lee Andrews; Richard S. Andrews, Charles Lee Andrews, Jr. and Carolyn (Amelia Walden Andrews) Thurber (Cooley) each inherited an undivided one-fifth (1/5 or 20%) ownership interest in the Subject Property.

16. As for the undivided one-fifth (1/5 or 20%) ownership interest in the Subject Property inherited by Charles Lee Andrews, Jr., to-wit:

(a) Under his (Charles Lee Andrews, Jr.) Last Will and Testament and administration thereof, he bequeathed such undivided one-fifth (1/5 or 20%) interest in the Subject Property to his wife, Nancy Sumner King Andrews, if she survived him otherwise to the trustee(s) of the "Nancy Sumner King Andrews Trust". (See Stipulated Document No. 39). ¹¹

17. As for the undivided one-fifth (1/5 or 20%) ownership interest in the Subject Property inherited by Carolyn Thurber Cooley, to-wit:

(a) Under her (Carolyn T. Cooley) Last Will and Testament and administration thereof, she bequeathed such undivided one-fifth (1/5 or 20%) interest in the Subject Property to her children specifically named and identified therein as Edythe T. Donovan, H. R. Thurber, Jr., Emma T. Wyatt and Richard S. Thurber. (See Stipulated Document No. 37).

(b) As a result of these testamentary bequests by Carolyn Thurber Cooley; Edythe T. Donovan, H. (Harry) R. Thurber, Jr., Emma T. Wyatt and Richard S. Thurber each inherited an undivided one-twentieth (1/20 or 5%) ownership interest in the Subject Property.

18. The Thurber Living Trust and Harry R. Thurber, Jr., (deceased) Defendants correctly aver that there is no genuine issue as to any material fact that the Susan W. Thurber Living Trust is the current owner of an undivided one-twentieth (1/20 or 5%) interest in and to the Subject Property and cannot be affected or reduced by any claims asserted in this instant matter. Such Defendants establish a valid chain of title to such interest that has been separately assessed with property taxes paid so that it was never delinquent or sold or forfeited to the State of West Virginia or to any third-party

¹¹ Under her (Nancy Sumner King Andrews) Last Will and Testament and administration thereof, she bequeathed any other such interest in real estate she died possessed to the trustee(s) of the "Nancy Sumner King Andrews Trust". (See Stipulated Document No. 40).

purchaser, including Ross. (See *particularly*, Stipulated Document Nos. 6, 21, 25, 28, 37, 54, 60 and 61).

19. The Donovan, Levine, Oakley, Thurber and Wyatt Defendants collectively establish *inter alia* to a legal certainty that Defendants, Patrick F. Donovan, Richard S. Thurber ¹² and Snowden Wyatt each currently own an undivided interest (5%) in and to the Subject Property through a valid chain of title to such individual interests. (See Stipulated Document Nos. 1, 37, 46, 49, 51, 55, 79).

20. Furthermore, their respective interests have each been regularly assessed upon the Land Books of Harrison County, West Virginia since the tax year 2000 without interruption and they have each received royalty and/or rental income from some of the named Defendants herein as identified.

21. Ross's April 2003 tax deed did not convey the undivided interests of these Defendants. (See *particularly*, Stipulated Document Nos. 1, 37, 46, 49, 51, 55 and 79).

22. As for the undivided one-fifth (1/5 or 20%) ownership interest in the Subject Property inherited by Richard S. Andrews from his father, Charles Lee Andrews, and uncle, George S. Andrew, to-wit:

(a) Under his (Richard Snowden Andrews) Last Will and Testament and administration thereof, he bequeathed such undivided one-fifth (1/5 or 20%) ownership interest in the Subject Property in nine (9) equal shares, to-wit: three (3) equal shares to his wife, Frances Brooks Andrews; four (4) equal shares to his son, Richard Snowden Andrews, Jr.; and two (2) equal shares in trust to his daughter, Marion A. Young. As a result thereof:

¹² By Deed dated June 19, 2014, of record in the Harrison County Clerk's Office in Deed Book 1535, at page 991, Richard S. Thurber conveyed all his right, title and interest in the subject mineral parcels underlying the related real estate herein to Richard S. Thurber and Timothy M. Thurber as Co-Trustees of the Richard S. Thurber Trust. (See Stipulated Document No. 55).

(i) Richard S. Andrews, Jr. received an undivided four-forty-fifths ($4/45$ or 8.888%) ownership interest in the Subject Property.

(ii) Marion A. Young received, in trust, an undivided two-forty-fifths ($2/45$ or 4.444%) ownership interest in the Subject Property.

(iii) Frances Brooks Andrews received an undivided three-forty-fifths ($3/45$ or 6.666%) ownership interest in the Subject Property.

(See Stipulated Document No. 38).

23. As for the undivided three-forty-fifths ($3/45$ or 6.666%) ownership interest in the Subject Property inherited by Frances Brooks Andrews, to-wit:

(a) Under Frances Brooks Andrews's Last Will and Testament and administration thereof, she bequeathed such undivided three-forty-fifths ($3/45$ or 6.666%) ownership interest to her daughter, Phyllis Fletcher Saunders. (See Stipulated Document No. 42).

(b) Under Phyllis F. Saunders's Last Will and Testament and administration thereof, she bequeathed such undivided three-forty-fifths ($3/45$ or 6.666%) interest received from her mother to her sons; Charles H. T. Saunders, Douglas W. Saunders and Donald B. Saunders. As a result thereof, to-wit:

(i) Charles H. T. Saunders received an undivided one-forty-fifths ($1/45$ or 2.222%) ownership interest in the Subject Property.

(ii) Douglas W. Saunders received an undivided one-forty-fifths ($1/45$ or 2.222%) ownership interest in the Subject Property.

(iii) Donald B. Saunders received an undivided one-forty-fifths ($1/45$ or 2.222%) ownership interest in the Subject Property.

(See Stipulated Document No. 50).

24. Ross successfully establishes, in summary fashion as a matter of law, that it is entitled to summary judgment due to owning an undivided four-fifths (4/5 or 80%) ownership interest in the Subject Property. Such interest was assessed in the name of Charles Lee Andrews and sold to Ross at the 2001 delinquent tax sale.

25. That undivided four-fifths (4/5 or 80%) ownership interest includes interests now deemed erroneously claimed by L&D and realigned Richard Snowden Andrews, Jr., the Marion A. Young Trust (and/or its successors Charles A. Young, David L. Young and Lavinia Young Davis), the Phyllis F. Saunders heirs (Defendants Charles Saunders, Douglas Saunders and Donald Saunders), and Hitzelberger because *inter alia* they or their predecessors in title were not separately assessed for their real property interests in the O&G.

26. Essentially, *inter alia*, Ross convincingly asserts *inter alia* that: (a) these parties failed to do what was required and necessary in order to have their respective oil and mineral parcel interests underlying the related real estate tracts separately assessed or pay the delinquent taxes on the account that included their interests; (b) having neglected to do so, their respective ownership interests were legitimately sold out from under them; and (c) any potential claims of these parties' are properly barred by the three (3) year statute of limitation on challenges to tax deeds (i.e., *West Virginia Code* § 11A-4-4(a)).

27. L&D incorrectly purports to have acquired its ownership interest in the subject oil and gas mineral parcels underlying the related real estate tracts by way of duly notarized Quitclaim Deeds executed by Deborah Lee Tschappat and Michael Hillman Tschappat as respective heirs of Catherine Lee Tschappat. (See Stipulated Document Nos. 9 and 10).

28. Ross purchased the delinquent tax lien in the name of Charles Lee Andrews against the real property described, in part, therein as 1042.62 AC O&G Sycamore Creek. Such real property is further bounded and described in the related *Quitclaim Deed*, to-wit:

...the real estate on which the tax lien so purchases existed, situated in the County of Harrison bounded and described as follows:

All undivided interest in the oil and gas underlying that certain tract of land, assessed as 1042.62 acres, but conveyed as 1041.2 acres, situated on the water of Sycamore, Union-Outside District, Harrison County, West Virginia...[with a more particular boundary description therein following]...containing 1041.2 acres, more or less, being the same tract described by the deed recorded in Deed Book 136 at page 494.

(See Stipulated Document Nos. 5, 17 and 47).

29. In keeping with *West Virginia Code* § 11A-3-19, Ross provided to the Clerk of the County Commission of Harrison County, West Virginia its "List Of Those To Be Served With Notice To Redeem".

30. The persons named and identified (each including "or his heirs at law, devisees, creditors, representatives, successors or assigns) in such List for notice provided and served by certified mail included: Charles Lee Andrews, Richard C. Thurber, Emma T. Wyatt, H. R. Thurber, Jr. and Edyth T. Donavan [sic]. Those likewise named and identified therein provided and served notice by publication included: Louis B. Barton, R. Snowden Andrew, Jr., Nancy King Andrews Stetson, Francis Brooks Andrews, Marion A. Young, Rosalie Forster Cooper, Robin Johnson Tuck, Josephine B. Taylor, Charles Lee Barroli, Rosalie Tunstall Smith, Anita Tunstall Smith and Marion Tunstall Smith.

31. One proper real estate tax assessment existed in respect to the entire 1041 acres of oil and gas mineral parcels underlying the related real estate (i.e.: the Subject Property), which was the tax assessment in the name of Charles Lee Andrews for 1,042.62 acres (i.e.: account #6428181).

32. Emmi Wyatt, H. R. Thurber, Jr., Richard S. Thurber and Edythe T. Donovan (each properly claiming an undivided one-twentieth (1/20 or 5%) interest in the Subject Property) requested separation of their respective interests in the Subject Property from the tax assessment in the name of Charles Lee Andrews (i.e.: account #6428181).

33. There are no other identified requests on sufficient record by any other professed owner for separation of any undivided interest in the subject oil and gas mineral parcels underlying the related real estate tracts made to or acknowledged by the proper authorities and offices of the County Commission of Harrison County, West Virginia. (See Stipulated Document Nos. 18, 21 and 94 at pp. 29-36, 56-60).

34. As such, the Harrison County Assessor's assessment of the subject oil and gas mineral parcels underlying the related real estate tracts at issue herein in 2000, reflects only the four (4) undivided interests of Emmi Wyatt, H. R. Thurber, Jr., Richard S. Thurber and Edythe T. Donovan as having ever been separated out from such longstanding assessment in the name of Charles Lee Andrews prior to the delinquent tax lien thereon.

35. During such time that the real estate property taxes became delinquent as to the Subject Property, the subsequent sale and purchase by Ross of the related delinquent tax lien and the conveyance and recordation of such interests by Tax Deed to Ross, other particularly identified Defendants, predecessors in interest and/or

realigned parties herein only held personal property tax assessments derived from producer's reports on income streams attributable to production from the subject oil and gas mineral parcels, to-wit:

(a) Catherine Tschappat (with subsequent heirship interests purportedly in Michael Hillman Tschappat and Deborah Lee Tschappat and subsequently conveyed to L&D);

(b) R.S. Andrews (with subsequent heirship interests purportedly in Richard S. Andrews, Jr. and in trust for Marion A. Young);

(c) Phyllis Sanders (with subsequent heirship interests purportedly in Charles Saunders, Douglas Saundier and Donald Saunders);

(d) Harry P. (Parsons) Cross (then estate) (with such interest purportedly conveyed to it by Carolyn S. Fahnestock's executors via deed unrecorded in Harrison County until 2014); and

(e) Hitzelberger (whose asserted interest herein came through a subsequent conveyance by the purported trustee of Mr. Cross's estate via Bill of Sale and Assignment recorded in Harrison County on January 20, 1989 in Deed Book 1306 at Page 1155). (See Stipulated Document No. 44).

36. Most, if not all of these, assessments contained incomplete and/or incorrect descriptions as well as inaccurate production information. No corrections of these inconsistencies were ever requested by any of these individuals or entities.

37. Prior to or at the time of 2000 Harrison County tax assessments and related 2001 delinquent tax lien sale, none of these parties ever requested a separate assessment of their undivided ownership interests in the subject mineral parcels underlying the related real estate tracts.

38. Harrison County Assessor's Office 1990 tax assessments in the names of R. S. Andrews and Phyllis Fletcher Saunders as well as later assessments in the names of their remaining heirs and parties herein (Richard S. Andrews, Jr., Marion A. Young Trust, Charles Saunders, Douglas Saunders and Donald Saunders) are all clearly described as assessments of leased interests which are personal property and not *de facto* identified real property interests.

39. Even if such personal property assessments were placed on Land Books and the corresponding personal property taxes paid thereon, such does not create a valid claim of ownership in and to any related real property interest. See *Welch v. Cayton*, 183 W.Va. 251, 395 S.E.2d 496 (1990).

40. Accordingly, eighty percent (80%) of such undivided interest in the Subject Property originally held by Mary Catherine Lee Andrews continued being assessed in the name of Charles Lee Andrews up to and including the year 2000. Even though he died in 1948, no other heirs and/or successors of Mary Catherine Lee Andrews had any of their respective, undivided interests separated out of that account (i.e.; Account No. 6428181).

41. As such and at the time of Ross's delinquent tax lien purchase of Account No. 6428181, an undivided four-fifths ($4/5$ or 80%) ownership interest in the Subject Property (aka the purported 1,042.62 acres more or less and as further identified in the original deeds of conveyance as 819 and 231 acres respectively more or less) was being assessed by such Assessor under such account upon which real estate taxes had become delinquent.

42. An assessment in the name of one owner of an undivided interest is sufficient to carry title of the other owners' interests when sold for delinquent taxes. *Bennett v. Greer Gas Coal Co.*, 127 W.Va. 184, 32 S.E.2d 51 (1944).

43. The rule is well established that real property and personal property must be assessed separately. *State v. South Penn Oil Co.*, 42 W.Va. 80, 24 S.E. 688 (1896).

44. Only real property is to be assessed on the Land Books. Oil and gas in place is an interest in real property, whereas income stream (which is based on an interest in produced or developed minerals) is an interest in personal property.

45. "Oil in place, of course, is part of the land in which it is found or from which it is obtained. When brought to the surface and reduced to possession it ceases to be real estate, and becomes personal property. *Warren v. Boggs*, 83 W.Va. 89, 96, 97 S.E. 589, 592 (1918). Also see *Collins v. Stalnaker*, 131 W.Va. 543, 547-549, 48 S.E.2d 430, 432-433 (1948) therein citing *Warren* and concurring that oil and gas in place when brought to the surface by production becomes personal property and royalties derived therefrom are likewise personal property.

46. *West Virginia Code* § 11A-3-37 states, to-wit:

It is the duty of the owner of land to have his land entered for taxation on the landbooks [sic] of the appropriate county, have himself charged with the taxes due thereon, and pay the same. Land which, for any five successive years, shall not have been so entered and charged shall, without any proceedings therefor, be subject to the authority and control of the Auditor and such nonentered lands shall thereafter be subject to transfer or sale under the provisions of this article relating to the Auditor's disposition of lands certified to the Auditor pursuant to section eight [§ 11A-3-8] thereof. (Bold type emphasis added by this Court).

47. Accordingly, real estate property owners have an obligation to have such ownership interests accurately entered for taxation on the Land Books of the

appropriate county, be properly charged with any taxes due on that interest and timely pay those taxes.

48. The purchaser of assessed real property interests at a delinquent tax sale acquires whatever interests assessed on that tax ticket, unless there is a separate or redundant assessment. *State v. Harman*, 50 S.E. 828, 57 W.Va. 447 (1905).

49. When the tax sale purchaser becomes the grantee of a tax deed, *West Virginia Code § 11A-3-30(a)* provides that a grantee in a tax deed acquires "...all right, title and interest, in and to the real estate, as was, at the time of the execution and delivery of the deed, vested in or held by any person who was entitled to redeem..." a right to redeem the interest which was sold for delinquent taxes, unless such required persons had arranged for separate assessment and payment of taxes on their real property interests.

50. *West Virginia Code § 11A-3-62(a)* expressly provides likewise that the title acquired by a purchaser of real estate sold at a tax sale, at the time of the execution and delivery of the deed, vests in such purchaser all right, title and interest held by any person who was entitled to redeem, "unless such person is one, who, being required by law to have his interest separately assessed and taxed, has done so and has paid all the taxes due thereon[.]" (Bold type emphasis added by this Court).

51. There are limited exceptions when the rights of such other persons owning an undivided interest in such real estate parcel are expressly saved by statute, to-wit:

(a) *West Virginia Code § 11A-3-6* [the sale of a real estate tax lien or any real estate conveyance by a tax deed to any identified officers therein is voidable].

(b) *West Virginia Code § 11A-4-2* [right to set aside sale of a real estate tax lien or a tax deed within three (3) years following delivery with civil action instituted for such effect and affecting only such interest sued upon].

(c) *West Virginia Code § 11A-4-3* [right to set aside a tax deed improperly obtained from the county clerk upon meeting requirements therein stated within three (3) years of such deed's delivery].

(d) *West Virginia Code § 11A-4-6* [right to redeem by someone under the disability of infancy or mental incompetency].

As to this instant litigation and oil and gas parcel ownership, only *West Virginia Code § 11A-4-3* is relevant to the facts herein.

52. After there has been a proper delivery of a tax deed by the authorized Clerk to the appropriate tax sale purchaser, *West Virginia Code § 11A-4-3* provides a three (3) year period from the date of delivery in which the former owner, the former owner's heirs, successors or assigns or a person who redeemed such real property interest conveyed by such tax deed may file a civil action to set that deed aside. Any action taken during this three (3) year time period must be under one (1) of the following circumstances:

(a) When the property at issue has been redeemed.

(b) When the tax sale purchaser has failed to comply with the requirement of *West Virginia Code § 11A-3-19* [What a purchaser must do before the deed can be secured] regarding the provision of notice of right to redeem.

(c) When the procedures for service of notice of right to redeem were not followed according to the time frame required by *West Virginia Code § 11A-3-52* [What a purchaser must do before he can secure a deed].

53. *West Virginia Code § 11A-4-4* [Right to set aside deed when one entitled to notice not notified] expressly states in pertinent part to this instant matter, to-wit:

(a) If any person entitled to be notified under the provisions of section twenty-two [§ 11A-3-22] or fifty-five [§ 11A-3-55], article three of this chapter is not served with the notice as therein required, and does not have actual knowledge that such notice has been given to others in time to protect his interests by redeeming the property, he, his heirs and assigns, may, before the expiration of three years following the delivery of the deed, institute a civil action to set aside the deed. No deed shall be set aside under the provisions of this section until payment has been made or tendered to the purchaser, or his heirs or assigns, of the amount which would have been required for redemption, together with any taxes which have been paid on the property since delivery of the deed, with interest at the rate of twelve percent per annum.

(b) No title acquired pursuant to this article shall be set aside in the absence of a showing by clear and convincing evidence that the person who originally acquired such title failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the complaining party or his predecessors in title. (Bold face type and underline emphasis provided by this Court).

54. The variously purported, undivided interests in the Subject Property ultimately inherited from Rosalie Forster Cooper's seven-seventy-fifth (7/75 or 9.333%) by Anthony Forster Cooper, Louise Elizabeth Forster Cooper Nicholson and Penelope Anne Forster Cooper (3.111%), John Forster Cooper (3.111%), and Catherine Lee Tschappat, Michael Hillman Tschappat and Deborah Lee Tschappat (3.111%) were never properly and validly assessed, at any time during their respective ownership, as real property which would have respectively separated such interest out from the real estate assessment still maintained in the name of Charles Lee Andrews.

55. As a direct result thereof, such real estate interests were not readily identifiable or discoverable by a delinquent tax lien purchaser attempting to strictly comply with statutory requirements in exercising reasonable due diligence so as to provide actual service of notice to any of these individuals.

56. Upon Ross's Tax Deed being delivered to him and its proper recordation, these respective parties' undivided ownership interests were conveyed thereunder and were otherwise lost by them absent redemption or other formal action taken within three (3) years after such delivery and recordation.

57. Particularly, Louise Elizabeth Forster Cooper Nicholson and Penelope Anne Forster Cooper (or their unknown heirs or successors), John Forster Cooper (or his unknown heirs or successors), Catherine Lee Tschappat, Michael Hillman Tschappat and Deborah Lee Tschappat each had the opportunity provided by applicable statutes to redeem or otherwise challenge Ross's purchase at the Delinquent Tax Sale on November 5, 2001 and subsequent Tax Deed from such time until April 2006 which would have been three (3) years after Ross's Tax Deed was delivered and recorded. Any right to statutorily redeem or otherwise challenge Ross's Tax Deed expired in April 2006 as any purported claims by these parties to an undivided ownership interest in the Subject Property are barred by the applicable statute of limitations contained in *West Virginia Code § 11A-4-4(a)*.

58. As Michael Hillman Tschappat and Deborah Lee Tschappat lost any undivided interest they each may have had in the Subject Property as a result all thereof, their respective Quitclaim Deeds (See Stipulated Document Nos. 9 and 10) essentially conveying all of their right, title, interest and claims of any kind or nature, in the described property therein purportedly being the related real estate tracts containing the underlying oil and gas mineral parcels at issue herein did not convey any ownership interest whatsoever in the Subject Property to L&D as there was none to convey.

59. Having not acquired any undivided ownership interest by such deeds in the Subject Property, L&D lacks legal standing in this instant matter to assert any further

causes of action herein purportedly relating to Ross, Antero, Consol, CNX or any other named defendant herein.

60. Neither Hitzelberger nor his predecessors in title as to his purportedly undivided one-fifth (1/5 or 20%) interest in the Subject Property ever had such interest properly and validly assessed as real property thereby separating it out from the real estate assessment still maintained in the name of Charles Lee Andrews. As a direct result, Hitzelberger's asserted undivided interest he purports to have in the Subject Property was lost upon the delivery to Ross of its Tax Deed.

61. Hitzelberger had the opportunity provided by applicable statutes to redeem or otherwise challenge Ross's delinquent tax lien purchase at the Tax Sale on November 5, 2001 and subsequent Tax Deed delivery and recordation from such time until April 2006, which would have been three (3) years after Ross's Tax Deed was delivered and recorded.

62. Any right to statutorily redeem or challenge Ross's Tax Deed expired in April 2006 as any purported claim by Hitzelberger to an undivided ownership interest in the Subject Property was never timely undertaken and is now barred by the applicable statute of limitations contained in *West Virginia Code § 11A-4-4(a)*.

63. There is no admissible evidence to prove that Hitzelberger was a bona fide purchaser of an undivided ownership interest in the oil and gas mineral parcels underlying the related real estate at issue herein. *West Virginia Code § 11-22-7*.

64. *Arguendo*, Hitzelberger's assessment in his name pertaining to purported leased/royalty interests in such property could not be connected by Ross, through any reasonably due diligence in meeting statutory requirements, to the Subject Property:

(a) The Deed purportedly conveying Carolyn S. Fahnstock's inherited interest in such parcels to his predecessor in title, Harry Parsons Cross, was not recorded until 2014.

(b) The purported *Assignment And Conveyance* by an acting institutional trustee of the Harry Parsons Cross Trust to Hitzelberger (recorded on January 20, 1999 in the Office of the County Clerk of Harrison County) describes only conveying in pertinent part herein "rights, titles and interests in and to all oil, gas and other minerals" ... "wherever situated, including but not limited to being situated in UNION DISTRICT OF HARRISON COUNTY, WEST VIRGINIA"...

65. Hitzelberger was assessed and paid taxes on a leased interest pertaining to an income stream from production related to the oil and gas mineral parcels underlying the related real estate at issue herein. Such personal property assessment regardless of its record location in the Assessor's office does not transform it into a real property interest and any taxes paid thereon does not cover the taxes assessed, due and owing on the Subject Property.

66. None of the variously purported, undivided interests in the Subject Property of Richard Snowden Andrews, Jr. (8.888%), Marion Young Heirs (4.444%) and the Saunders defendants (Phyllis Saunders [deceased], Charles Saunders, Douglas Saunders and Donald Saunders) (6.666%) were ever properly and validly assessed, at any time during their respective ownership, as real property which would have respectively separated such interests out from the real estate assessment still maintained in the name of Charles Lee Andrews.

67. As a direct result thereof, such real estate interests were not readily identifiable or discoverable by a delinquent tax lien purchaser attempting to strictly

comply with statutory requirements in exercising reasonable due diligence so as to provide actual service of notice to any of these individuals.

68. Upon Ross's Tax Deed being delivered to him and its proper recordation, these respective parties' undivided ownership interests were conveyed thereunder and otherwise lost by them absent redemption or other formal action taken within three (3) years after such delivery and recordation.

69. Particularly, Richard Snowden Andrews, Jr. the Marion A. Young Trust and/or its heirs/successors, Charles A. Young, David L. Young and Lavinia Young Davis the Saunders defendants (Phyllis Saunders [deceased], Charles Saunders, Douglas Saunders and Donald Saunders) each had the opportunity provided by applicable statutes to redeem or otherwise challenge Ross's purchase at the Delinquent Tax Sale on November 5, 2001 and subsequent Tax Deed from such time until April 2006 which would have been three (3) years after Ross's Tax Deed was delivered and recorded.

70. Any right to statutorily redeem or otherwise challenge Ross's Tax Deed expired in April 2006 as to any purported claims by these parties to an undivided ownership interest in the Subject Property was never timely undertaken and such claims are now barred by the applicable statute of limitations contained in *West Virginia Code* § 11A-4-4(a).

71. The variously purported, undivided interests in the Subject Property of Josephine Tunstall Barroll, as an heir of Anita Tunstall Smith, (purportedly being held in trust for her purported children Louise Barroll Barton, Josephine Barroll Taylor and Charles L. Barroll) (1.333%) or of Robin Tunstall Johnson Tuck, as an heir of Anita Tunstall Smith, Gerald Tunstall Johnson Tuck and John Johnson Tuck) (9.333%) were never properly and validly assessed as real property thereby respectively separating

them out from the real estate assessment still maintained in the name of Charles Lee Andrews. As a direct result, each of these defendants lost their respective interest in the Subject Property upon the delivery to Ross of its Tax Deed.

72. These individuals or their successors or heirs had the opportunity provided by applicable statutes to redeem or otherwise challenge Ross's purchase at the Delinquent Tax Sale on November 5, 2001 and subsequent Tax Deed from such time until April 2006, which would have been three (3) years after Ross's Tax Deed was delivered and recorded.

73. Any right to statutorily redeem or otherwise challenge Ross's Tax Deed expired in April 2006 as any purported claims by these parties to an undivided ownership interest in the Subject Property was never timely undertaken and such claims are now barred by the applicable statute of limitations contained in *West Virginia Code § 11A-4-4(a)*.

74. As a matter of law, Ross made reasonably due diligent efforts to comply with the applicable statutory requirements following its purchase of the Delinquent Tax Lien at the 2001 Delinquent Tax Sale under the totality of record circumstances by, to-wit: (a) causing a sufficient investigation to be made of the courthouse records in order to identify and locate persons entitled to notice of right to redeem; (b) submitting such information within the requisite time period; (c) having notices timely served by certified mail on such persons and/or entities for which addresses had been located; and (d) having notices timely served by publication on all persons sufficiently identified having ownership interests and being found in the recorded, real estate instruments pertaining to applicable chain of title in the Subject Property by publication as a Class III legal advertisement in the *Clarksburg Exponent/Telegram*.

75. There is no requirement under West Virginia law a Delinquent Tax Lien purchaser must utilize a licensed attorney-at-law for an examination of real estate title in meeting statutory requirements so as to timely finalize delivery and receipt of Tax Deed for such real estate interests so purchased.

76. *West Virginia Code § 11A-3-19* requires the purchaser of a Delinquent Tax Lien to prepare a list of persons entitled to notice upon a good faith effort to ascertain such persons' identity based upon the information available from public records. Ross timely prepared such List upon a good faith effort.

77. In *Menonite Bd. Of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed. 2d 180 (1983), our United States Supreme Court addressed the adequacy of notice of right to redeem delinquent tax property, in deference to the due process rights of a delinquent landowner by stating that notice is mandatory for parties who can be reasonably ascertained or identified.

78. In *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed. 2d 415 (2006), such Court further identified additional efforts necessary in attempting to provide actual notice to a landowner after notice by certified mail was returned as unclaimed before [in that particular case] the State of Arkansas proceeded to sell such property so as to meet due process requirements of adequate notice before delivering a tax deed to a tax lien purchaser.

79. Before the *Jones* decision, West Virginia adopted extensive revisions to its applicable statutory scheme for tax sales of delinquent real property in 1994 and 1995. The three (3) year statute of limitation for challenges to tax deeds by persons entitled to notice of right to redeem who did not receive such notice that is contained in *West Virginia Code § 11A-4-4(a)* was also contained in its predecessor.

80. Our State Supreme Court, in *Shaiffer v. Mareye Oil Corp.*, 157 W.Va. 816, 204 S.E.2d 404 (1974) held that such a three (3) year limitation on actions to set aside tax deeds did not violate the due process clause of the Fourteenth Amendment to the *United States Constitution*.

81. Following the *Jones* decision, this matter was revisited in *Wells Fargo Bank, N.A. v. UP Ventures II, LLC*, 223 W.Va. 407, 675 S.E.2d 883 (2009) wherein our State Supreme Court reiterated the validity of this three (3) year statute of limitation as well as its not violating the due process clause of the *West Virginia Constitution* or the *United States Constitution*.

82. Syllabus Pt. 2 therein specifically states, "The three-year statute of limitation found in *W.Va.Code*, 11A-4-4(a) [1994] relating to the institution of a civil action to set aside a tax deed does not violate the Due Process Clause of the *West Virginia* and *United States Constitutions*." ¹³ (Also see *Mason v. Smith*, 233 W.Va. 673, 760 S.E.2d 487 (2014).

¹³ *Wells Fargo*, at 886-887, 410-411, provides a particularly applicable discussion, to-wit:

...These due process concerns are triggered because a tax sale to a private party under West Virginia law involves "state action" requiring due process, since, to accomplish a tax sale, a private party must make use of state procedures with overt, significant assistance of state officials. See *Plemmons v. Gale* 396 F.3d 569, 572 (4th Cir.2005).

The Legislature contemplated property owners' due process rights when enacting West Virginia's statutory tax scheme and sought to balance the due process rights of property owners with the need to find a cost effective, speedy means of conducting tax sales. The Legislature also sought to ensure that property owners and lienholders of record would be provided adequate notice of a property sale. The Legislature enumerated the purpose and policy behind the statutory tax scheme in *W.Va.Code*, 11A-3-1, stating in relevant part:

the Legislature declares that its purposes in the enactment of this article are as follows: (1) To provide for the speedy and expeditious enforcement of the tax claims of the state and its subdivisions; ... (3) to secure adequate notice to owners of delinquent and nonentered property of the pending issuance of a tax deed; ... (5) to reduce the expense and burden on the state and its subdivisions of tax sales so that such sales may be conducted in an efficient manner while respecting the due process rights of owners of real property ...

83. The Court, in *Wells Fargo*, The Legislature has announced the purpose and policy behind its tax sale statutory scheme and has found that a proper statute of limitation is three years. This Court will not invade the Legislature's function and extend the statute

84. Persons who own interests in real property which can be reasonably ascertained from public records or otherwise are entitled to notice by certified mail or other means. *Mingo County Redevelopment Authority v. Green*, 534 S.E.2d 40 (2000)

85. Syllabus point 2 in *Green* particularly states, to-wit:

" "When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such a case it is the duty of the courts not to construe but to apply the statute." Point 1, syllabus, *State ex rel. Fox v. Board of Trustees of the Policemen's Pension or Relief Fund of the City of Bluefield, et al.*, 148 W.Va. 369 [135 S.E.2d 262 (1964)]. Syllabus Point 1, *State ex rel. Board of Trustees v. City of Bluefield*, 153 W.Va. 210, 168 S.E.2d 525 (1969)." Syl. pt. 3, *Central West Virginia Refuse, Inc. v. Public Service Com'n of West Virginia*, 190 W.Va. 416, 438 S.E.2d 596 (1993).

86. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the

This Court commented on what a party must do to comply with these due process concerns, stating in Syllabus Point 1 of *Lilly v. Duke*, 180 W.Va. 228, 376 S.E.2d 122 (1988):

There are certain constitutional due process requirements for notice of a tax sale of real property. Where a party having an interest in the property can reasonably be identified from public records or otherwise, due process requires that such party be provided notice by mail or other means as certain to ensure actual notice.

The U.S. Supreme Court spoke to this constitutional due process issue in *Memmonite Bd. of Missions v. Adams*, 462 U.S. 791, 800, 103 S.Ct. 2706, 2712, 77 L.Ed.2d 180, 188 (1983), stating:

Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

Both the *Lilly* and *Memmonite* cases state that notice is mandatory for parties who are "reasonably ascertainable" or "can reasonably be identified."

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

87. This test has long been applied to determine whether notice passes constitutional muster. See, e.g., *Jones v. Flowers*, 547 U.S. 220, 226 (2006); *Plemons*, 396 F.3d at 573.

88. In 1983, the Supreme Court honed its standard by requiring the state to undertake "reasonably diligent efforts" to ascertain the address of one entitled to notice. See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 n. 4 (1983).

89. To this end, West Virginia law requires tax lien purchasers, through a statutorily designated authority, to notify individuals of their right to redeem the property before title is transferred. Efforts undertaken by the tax lien purchaser to identify these individuals must be "reasonably diligent." Whether a tax lien purchaser performs his or her duties in a reasonably diligent manner, however, can be examined only "under all the circumstances" of a given case. See *Mullane*, 339 U.S. at 314.

90. There are deemed no genuine issues of material fact as to the reasonable determination of ownership interests in and to the Subject Property made by Ross in complying with applicable statutes for ultimately effectuating delivery and recordation of its Tax Deed.

91. Following its delinquent tax lien purchase in 2000 and reasonably due diligence for complying with the applicable statutory requirements, under the totality of predicate factual circumstances and the abundant lack of clarity in accessible records identified herein and a matter of record, Ross fulfilled timely listing reports and serving

of notice requirements in order to ultimately effectuate the delivery and recordation of a tax deed in keeping with statutory provisions.

92. There is no sufficient showing by any clear and convincing evidence that Ross failed to conduct a duly diligent record search as required by the then applicable *W.Va. Code §§ 11A-3-52, 11A-3-55 and 11A-4-4*.

93. There is no sufficient showing by any clear and convincing evidence that Ross failed to provide statutorily required notice of service in timely fashion for and legitimate redemption under the totality of circumstances and available records in timely fashion.

94. The Harrison County Assessor's records clearly indicate that L&D's purported predecessors in title were assessed only for income shown on producer's reports, "income stream", which is personal property, and not for their interests in the oil and gas in place, which is real property.

95. By 2001, the real property interests in the Subject Property of all other actual or purported owners, except for Defendants, of Emmi Wyatt (Snowden), H. (Harry) R. Thurber, Jr., Richard S. Thurber and Edythe T. Donovan: (a) continued to be assessed under the name of Charles Lee Andrews; (b) became delinquent; and (c) were purchased by Ross.

96. Various pleaded claims of undivided ownership interests in the Subject Property by L&D and realigned parties as well as any Defendant party to these proceedings, other than Defendants, Emmi Wyatt (Snowden), H. (Harry) R. Thurber, Jr., Richard S. Thurber and Edythe T. Donovan and/or their successors, heirs or devisees, are of no legal effect as their purported interests being sued upon were extinguished under the three (3) year statute of limitation contained in *West Virginia Code §11A-4-4*.

97. As Ross previously stated in related pleadings herein that it is not pursuing any claim of reimbursement of royalties allegedly paid erroneously or otherwise to any party in this instant matter and pertaining to such oil and gas ownership interests or any other monetary damages, any cross-claims or counterclaim heretofore pleaded by it herein are deemed to be moot.

98. Under all attendant factual circumstances sufficiently developed and shown by the evidentiary record herein pertaining to Ross's delinquent tax lien purchase and ultimate delivery and recordation of its tax deed, it is further and clearly entitled to rely on the statute of limitation contained in *West Virginia Code §11A-4-4*.

99. There has been no definitive or otherwise sufficiently substantive showing by any party herein of Ross having deliberately and/or recklessly violated any due process requirements that would subject it to forfeiture of the Subject Property interests, in whole or in part, that was purchased in 2001 and there were properly conveyed to it by Tax Deed on April 1, 2003.

100. An owner cannot be deprived of his land by sale thereof for taxes unless the procedure prescribed by the statute, strictly construed, is substantially complied with. *Koontz v. Ball*, 96 W.Va. 117, 122 S.E. 461 (1924).

101. Claimed defects in assessments on the Assessor's Land Books of various parties' interests are not cured by virtue of *West Virginia Code § 11A-3-73* because they were not valid assessments of real property but, personal property assessments based on "Income Stream".

102. Under the totality of factual and procedural circumstances, as contained in the evidentiary record compiled herein by the various parties and pleaded in dispositive fashion, it is concluded that:

(a) L&D and realigned parties have failed to demonstrate by clear and convincing evidence that Ross did not exercise reasonably diligent efforts to sufficiently ascertain the identity of owners in the undivided interests in the subject oil and gas mineral parcels underlying the related real estate tracts at issue herein as well as sufficiently notify those parties under statutory requirements of its intent to acquire the subject minerals through a tax deed.

(b) Hitzelberger has failed to demonstrate by clear and convincing evidence that Ross did not exercise reasonably diligent efforts to sufficiently ascertain the identity of owners in the undivided interests in the subject oil and gas mineral parcels underlying the related real estate tracts at issue herein as well as sufficiently notify those parties under statutory requirements of its intent to acquire the subject minerals through a tax deed.

(c) Defendants, Charles Saunders, Douglas Saunders and Donald Saunders (as heirs of Phyllis F. Saunders) have failed to demonstrate by clear and convincing evidence that Ross did not exercise reasonably diligent efforts to sufficiently ascertain the identity of owners in the undivided interests in the subject oil and gas mineral parcels underlying the related real estate tracts at issue herein as well as sufficiently notify those parties under statutory requirements of its intent to acquire the subject minerals through a tax deed.

103. Our State's property tax statutes give warning to the owner that if he does not pay his taxes he may lose his land. This Court agrees with the encompassing proposition that: every property owner is presumed to know that his surface and underlying mineral, real property interests are taxable; they will be assessed accordingly; tax levies will be extended against them; those assessments will be placed

on tax lists; it is the property owner's duty to timely pay any such assessed taxes; if payment(s) is (are) not made within the required time period; such interest(s) will be offered for sale at a time and place statutorily specified; and it (they) will be offered for sale at a County Commissioner's sale with someone buying it (them).

104. "The imposition of the duty upon the defendant owner to learn what was being done to enforce the payment of taxes against his property and the limitation upon his right to attack the foreclosure decree is a legitimate exercise of legislative power in carrying out a property tax program." *Shaffer* 157 W.Va. at 827-28, 204 S.E.2d at 411.

105. Such dispossessed parties' right to challenge Ross's Tax Deed pertaining to the Subject Property assessed and returned delinquent in the name of Charles Lee Andrews expired in April 2006 as their purported ownership interests were not rightfully asserted in a timely manner pursuant to statutory provisions. As such, their respective claims are now barred by the applicable statute of limitation contained in *West Virginia Code* § 11A-4-4(a).

106. As a matter of law, Ross's conduct in purchasing the delinquent tax lien in the name of Charles Lee Andrews for the delinquent 2000 taxes on the Subject Property and in exercising reasonably diligent efforts for carrying out the statutory requirements so as to effect delivery and recordation of its Tax Deed dated April 1, 2003 cannot be deemed intentionally or deliberately or recklessly negligent.

107. As such, there can be no triggering of any discovery rule application in this instant matter which would somehow otherwise allow any of the parties herein disposed of their property interests as a result of such Tax Deed to toll the running of the applicable statute of limitation under *West Virginia Code* § 11A-4-4.

108. As a matter of law, there is now particularly no real controversy regarding the judicially identified, undivided ownership interests in and to the Subject Property given the applicable facts and that the applicable law supports summary judgment herein for Defendant, Mike Ross, Inc., as requested specifically thereto.

109. Upon the entirety of this analysis, it is concluded that there is also now particularly no real controversy regarding the undivided ownership interests of the Subject Property given the totality of applicable facts herein and that the applicable law supports summary judgment for Defendants, Susan Thurber Living Trust and Harry R. Thurber, Jr. (Deceased) as requested and Defendants, Defendants' Caroline Donovan, Edythe T. Donovan (Deceased), Margaret Donovan, Patrick F. Donovan, William Daniel Donovan, Nena Donovan Levine, Jessica Libra Oakley, Richard S. Thurber, Emmi (Emma) T. Wyatt (Deceased) And Snowden Wyatt as requested specifically thereto.

110. Appropriate declaratory judgments all thereon may also now be made.

Rulings

Upon a complete review of the pleadings and proceedings heretofore filed herein along with full consideration given to the various parties' claims, counterclaims and cross-claims upon which these pending motions pertain, this Court has applied quite a concerted amount of research and deliberation all thereon. With these efforts reflected herein *supra* along with its in-depth analysis and discussion this Court now makes the following pronouncements and rulings, to-wit:

1. This Court hereby **ORDERS** that Defendant, Richard Snowden Andrews, Jr.'s, *Motion For Realignment As Party Plaintiff* be and is **GRANTED**. As such, for purposes of further substantive rulings herein being made *infra*, Mr. Andrews is now aligned herein as a party Plaintiff.

2. This Court hereby ORDERS that the *Motion To Add Successors As Named Plaintiffs And Realign Them As Party Plaintiffs* on behalf of Charles A. Young, David L. Young and Lavinia Young Davis (as successors/heirs of Marion A. Young upon her death, the dissolution of the named Defendant, Marion A. Young Trust, and distribution of her purported interest under her Last Will and Testament) be and is GRANTED. As such, for purposes of further substantive rulings herein being made *infra*, these parties are now realigned and otherwise named herein as Plaintiffs.

3. Having granted such Motions, this Court further hereby *sua sponte* ORDERS that the style of this civil action be and is REVISED to reflect such additions and changes as to these parties.

Having ruled on these preliminary matters, this Court now announces rulings on the pending motions for summary judgment and partial summary judgment, as fully addressed and analyzed herein *supra*, along with additional rulings related to the parties' variously pleaded causes of action so affected by such motion rulings.

Accordingly, this Court hereby ORDERS, in keeping with the order in which such Motions were filed, that:

1. Defendant *Mike Ross, Inc.'s Motion For Summary Judgment* be and is GRANTED insofar as Ross be and is declared and adjudged, as a matter of law, the sole owner of an undivided four-fifth ($\frac{4}{5}$ or 80%) interest in and to the oil and gas mineral parcels underlying the related real estate tracts at issue herein, such being the Subject Property in this civil action and more fully identified and described herein *supra*.

Therefore, judgment be and is GRANTED in favor of Ross and against L&D, otherwise realigned party Plaintiffs and other Defendants. As such, Plaintiff's Second

Amended Complaint, as joined by realigned parties, fails as a matter of law and is DISMISSED, WITH PREJUDICE, as to Ross.

As it relates to such parties, judgment be and is further GRANTED in favor of Ross and against such Plaintiffs, as a matter of law, on *Plaintiff's Counterclaim Against Mike Ross, Inc.* wherein a claim of denial of due process was asserted. Therefore, such Counterclaim is DISMISSED, WITH PREJUDICE.

As it relates to such parties and subsequent pleadings of Ross, judgment be and is further GRANTED in favor of Plaintiffs and against Ross as to *Counterclaim Of Defendant, Mike Ross, Inc.* wherein a claim of slander of title was originally asserted against L&D. Therefore, such Counterclaim is DISMISSED, WITHOUT PREJUDICE. (Also see *supra*).

2. *Motion For Summary Judgment Of Defendants, Susan Thurber Living Trust And Harry R. Thurber, Jr. (Deceased)* be and is GRANTED insofar as the Susan W. Thurber Living Trust and Harry R. Thurber, Jr. (deceased) be and are declared the sole owners of an undivided one-twentieth (1/20 or 5%) ownership interest in and to the oil and gas mineral parcels underlying the related real estate tracts at issue herein and being the Subject Property in this civil action and more fully identified and described herein *supra*. (Also see *infra*).

As such, their undivided one-twentieth (1/20 or 5%) ownership interest is separate and apart from any purported claims by Plaintiffs or the interest acquired by Defendant, Mike Ross, Inc. under his 2003 Tax Deed pertaining to such mineral parcels underlying the related real estate and is thereby neither affected nor reduced thereby.

Therefore, judgment be and is GRANTED in favor of these Defendants and against Plaintiffs so that Plaintiff's Second Amended Complaint, as joined by realigned parties, is DISMISSED, WITH PREJUDICE, as to them.

3. Defendants *SWN Production Company, LLC And Enervest Operating, LLC's Motion For Summary Judgment* be and is GRANTED insofar as any and all claims purportedly asserted, if any, against them by Plaintiff's Second Amended Complaint, as joined by additional parties, do not establish any cause of action against upon which relief may be granted to it or the Defendants realigning themselves as Plaintiffs. As such, judgment be and is GRANTED in favor of these Defendants and against Plaintiff so that Plaintiff's Second Amended Complaint, as joined by realigned parties, is DISMISSED, WITH PREJUDICE, as to them.

4. Defendants' *Caroline Donovan, Edythe T. Donovan (Deceased), Margaret Donovan, Patrick F. Donovan, William Daniel Donovan, Nena Donovan Levine, Jessica Libra Oakley, Richard S. Thurber, Emmi (Emma) T. Wyatt (Deceased) And Snowden Wyatt Motion For Summary Judgment* be and is GRANTED insofar as these Defendants be and are collectively declared the sole owners of an undivided three-twentieths (3/20 or 15%) ownership interest in the oil and gas mineral parcels underlying the related real estate being the Subject Property in this civil action and more fully identified, described and apportioned herein *supra*. (Also see *infra*).

As such, this collective, undivided three-twentieths (3/20 or 15%) ownership interest is separate and apart from any purported claims by Plaintiffs or the interest acquired by Defendant, Mike Ross, Inc. under his 2003 Tax Deed pertaining to such mineral parcels underlying the related real estate and is thereby neither affected nor reduced thereby.

Therefore, judgment be and is GRANTED in favor of these Defendants and against L&D and the otherwise realigned parties so that Plaintiff's Second Amended Complaint, as joined by realigned parties, be and is DISMISSED, WITH PREJUDICE, as to these undivided interest owners.

5. *Defendant Antero Resources Corporation's Motion For Summary Judgment* be and is GRANTED insofar as Plaintiffs' averred causes of action against it purportedly involving pooling issues, unjust enrichment, abandonment and trespass are deemed moot in light of the this Court's declaration of ownership interests herein as to the Subject Property.

Therefore, judgment is GRANTED in favor of Antero and against L&D and the otherwise realigned parties so that Plaintiff's Second Amended Complaint be and is DISMISSED, WITH PREJUDICE, as to it.

As it relates to such parties, judgment be and is further GRANTED in favor of Plaintiffs and against Antero as to Antero's counterclaim against them. Therefore, such Counterclaim be and DISMISSED, WITH PREJUDICE.

6. *Defendant CONSOL Energy Inc. And CNX Gas Company LLC's Motion For Summary Judgment* is GRANTED insofar as Plaintiffs' averred causes of action against it purportedly involving pooling issues, unjust enrichment, abandonment and trespass are deemed moot in light of the this Court's declaration of ownership interests herein as to the Subject Property.

Therefore, judgment be and is GRANTED in favor of Consol and CNX and against L&D and the otherwise realigned parties so that Plaintiff's Second Amended Complaint be and is DISMISSED, WITH PREJUDICE, as to them.

As it relates to such parties, judgment be and is further GRANTED in favor of Plaintiffs and against Consol and CNX as to Consol and CNX's counterclaim against them. Therefore, such Counterclaim be and DISMISSED, WITH PREJUDICE.

7. *Robert Hitzelberger's Motion For Summary Judgment* be and is GRANTED, IN PART, as to L&D and realigned parties and DENIED, IN PART, as to Ross. Therefore, judgment be and is GRANTED in favor of Hitzelberger and against L&D and realigned parties so that Plaintiff's Second Amended Complaint be and is DISMISSED, WITH PREJUDICE. as to him.

As it relates to such parties, judgment be and is further GRANTED, IN PART in favor of Ross and against Hitzelberger upon *Mike Ross, Inc.'s Amended Cross-Claim* insofar as being in keeping with this Court's declaratory judgment of Ross's undivided four-fifths (4/5 or 80%) ownership interest in the Subject Property which includes the undivided one-fifth (1/5 or 20%) interest in the Subject Property and heretofore claimed by Hitzelberger.

In light of subsequent pleadings filed herein by Ross as well as the rulings being made herein as a matter of law, Ross's further averred cross-claims therein as to slander of title and tortious interference against Hitzelberger. are *sua sponte* DISMISSED, WITH PREJUDICE, and judgment be and is GRANTED in favor of Hitzelberger and against Ross thereon.

8. *Plaintiff's L&D Investments, Inc., Richard Snowden Andrews, Jr. And The Marion A. Young Trust's Motion For Partial Summary Judgment To Establish Their Ownership And For Declaration That Defendant Mike Ross, Inc.'s 2003 Tax Deed Is Void Or Voidable* is DENIED, IN PART, as a matter of law, as to determining Ross's Tax Deed being void and of no effect well and GRANTED, IN PART, as to quieting title

to the subject property by identifying the owners of the subject property without the need for any further submissions by the parties on their positions as to the percentage of undivided ownership interests in the subject property as determination of any ownership percentages now being MOOT upon the totality of findings, conclusions and rulings herein made.

9. *Plaintiff's Motion For Summary Judgment Regarding The Counterclaim Of Defendant Mike Ross, Inc.* pertaining to Ross's counterclaim for slander of title is GRANTED. Therefore, judgment be and is GRANTED in favor of L&D and realigned parties and against Ross on such counterclaim.

However, in light of subsequent pleadings filed herein by Ross as well as the rulings being made herein as a matter of law, Ross's further averred crossclaim as to slander of title against L&D and realigned parties is *sua sponte* DISMISSED, WITHOUT PREJUDICE.

10. *Plaintiff's Motion For Partial Summary Judgment Regarding Unauthorized Pooling* pertaining to purported liability on their claims of unauthorized pooling resulting in the trespass by Antero to Plaintiff's purported mineral property is DENIED, as a matter of law, as well as now being MOOT upon the totality of findings, conclusions and rulings herein made.

Having so ruled on these summary judgment motions and their related judgments, this Court further makes other related rulings on the remaining identified claims of these parties still outstanding.

Accordingly, this Court hereby ORDERS that:

1. Antero's cross-claims respectively made against Ross and Hitzelberger be and are DISMISSED, WITH PREJUDICE.

2. Consol and CNX's cross-claims respectively made against Ross and Hitzelberger be and are DISMISSED, WITH PREJUDICE.

3. Ross's cross-claim respectively made against Antero, Consol, CNX and Hitzelberger as to any purported damages to Plaintiffs be and are DISMISSED, WITH PREJUDICE now being MOOT or otherwise WITHDRAWN.

Having so ruled upon these motions for summary judgment as well as rendered the necessary and various judgments pertaining thereto, this Court further hereby ORDERS that:

1. Defendant, Mike Ross, Inc., be and is DECLARED the sole owner of an undivided four-fifths ($4/5$ or 80%) ownership interest in the subject oil and gas mineral parcels underlying the subject real estate tracts specifically identified in this civil action as the Subject Property and herein further described *supra*.

2. Defendant, Snowden Wyatt, be and is DECLARED the sole owner of an undivided one-twentieth ($1/20$ or 5%) ownership interest in the subject oil and gas mineral parcels underlying the subject real estate tracts specifically identified in this civil action as the Subject Property and herein further described *supra*.

3. Defendant, Susan W. Thurber Living Trust, be and is DECLARED the sole owner of an undivided one-twentieth ($1/20$ or 5%) ownership interest in the subject oil and gas mineral parcels underlying the subject real estate tracts specifically identified in this civil action as the Subject Property and herein further described *supra*.

4. Defendant, Patrick F. (Fitzgerald) Donovan, be and is DECLARED the sole owner of an undivided one-twentieth ($1/20$ or 5%) ownership interest in the subject oil and gas mineral parcels underlying the subject real estate tracts specifically identified in this civil action as the Subject Property and herein further described *supra*.

5. Defendant, Richard S. Thurber, as Co-Trustee, and Timothy M. Thurber, Co-Trustee of the Richard S. Thurber Trust be and are DECLARED the sole owner(s) of an undivided one-twentieth (1/20 or 5%) interest in the subject oil and gas mineral parcels underlying the subject real estate tracts specifically identified in this civil action as the Subject Property and herein further described *supra*.

Further, this Court hereby ORDERS that this Order shall be properly recorded and indexed in the Office of the Clerk of the County Commission of Harrison County, West Virginia. To such end, this Court hereby DIRECTS the Clerk of this Court to transmit a certified copy of this Order to the Clerk of the County Commission of Harrison County, West Virginia who shall record and appropriately index the same.

All pending motions and other matters have now been fully entertained and ruled upon herein and, thereby, this Court has further addressed all previously pending causes of actions, claims, cross-claims and counterclaims of the various parties herein to a final disposition.

All thereupon, this Court hereby *sua sponte* ORDERS that all parties herein who are adversely affected by its plethora of procedural and substantive rulings, as a matter of law, hereinabove stated be and are GRANTED any and all appropriate objections and exceptions thereto as each may deem necessary.

This Court now hereby ORDERS that all parties and legal counsel herein be and are INTSTRUCTED that the *Protective Order* entered herein on November 6, 2014 contains controlling language, particularly in paragraph nos. 10 and 11 on pages 4 and 5 thereof, as to any future appeal and/or the termination of this lawsuit by judgment.

Additionally, there being a *Protective Order* entered herein on March 25, 2016 pertaining to confidential records produced by the Assessor of Harrison County, West

Virginia, pursuant to a related Order entered herein, this Court hereby ORDERS that any documentation produced thereunder and qualifying for protection shall likewise be protected under such controlling language in the November 6, 2014 *Protective Order*.

Having all so ruled, this Court hereby further ORDERS that all parties herein be and are INFORMED that they shall be responsible for their respective attorney's fees and costs associated with this civil action and that there shall be no award of any such fees or costs attributed to any other party. As this Court has also been otherwise informed by its Discovery Commissioner, Teresa J. Lyons, Esq., there are no outstanding fees due her from any party herein for her distinguished service during the extensive course of discovery herein.

There being nothing further, this Court hereby ORDERS that the Clerk of this Court be and is DIRECTED to retire this civil action from its active docket upon the entry of this Order and forthwith filing of Rule 4(e) notice documentation by Plaintiffs' legal counsel as ordered herein *supra* as well as completion of all other directives herein contemplated.

Finally, this Court DIRECTS the Clerk of this Court to provide and/or otherwise send certified copies of this Order to the following:

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*Counsel for Defendant Antero
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*Counsel for EnerVest Operating, L.L.C.
(now properly CGAS Properties, L.L.C.)
and SWN Production Company, LLC*

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Benjamin G. Davisson, Esq.
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Harry R. Thurber (deceased)*

Penelope Anne Forster-Cooper
Gramery Farms Forty Foot
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Cambridgeshire, PE17 IXS
United Kingdom
Defendant Pro Se

Joseph R. "Rocky" Romano, Assessor
Harrison County Courthouse
301 West Main Street
Clarksburg, WV 26301
*Assessor for Harrison County,
West Virginia*

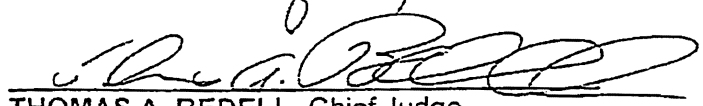
Geraldine S. Roberts, Esq.
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*Counsel for Wyatt and Donovan
Defendants (descendants)*

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Sharon Z. Hall, Esq.
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Counsel for Saunders Defendants

Louise Nicholson
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Kirby Mallory
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United Kingdom
Defendant Pro Se

ENTER: February 21, 2017


THOMAS A. BEDELL, Chief Judge

Bed. 419

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

L&D INVESTMENTS, INC., a West Virginia corporation,
RICHARD SNOWDEN ANDREWS, JR., MARION A.
YOUNG TRUST, CHARLES A. YOUNG, DAVID L. YOUNG
and LAVINIA YOUNG DAVIS, successors of Marion A. Young,

Plaintiffs,

v.

Civil Action No. 13-C-528-2
THOMAS A. BEDELL, Chief Judge

ANTERO RESOURCES CORPORATION,
formerly known as ANTERO RESOURCES
APPALACHIAN CORPORATION, CONSOL
ENERGY, INC., a foreign corporation, CNX
GAS COMPANY, LLC, a foreign limited liability company,
MIKE ROSS, INC., a West Virginia corporation,
ROBERT HITZELBERGER, SWN PRODUCTION
OPERATING, LLC, ENERGY CORPORATION OF
AMERICA, ENERVEST OPERATING, LLC, ¹
CHARLES LEE ANDREWS, III, CHARLES LEE
ANDREWS, III, TRUST, CHARLES LEE BARROLL (deceased),
LOUISE B. BARTON, MILLARD K. BEYER (deceased)
JOHN FORSTER COOPER (deceased),
PENELOPE ANNE FORSTER-COOPER,
CAROLINE DONOVAN, EDYTHE T. DONOVAN
(deceased), MARGARET DONOVAN,
PATRICK F. DONOVAN, WILLIAM DANIEL DONOVAN,
NENA DONOVAN LEVINE, LOUISE NICHOLSON,
JESSICA LIBRA OAKLEY, CHARLES H.T. SAUNDERS,
DONALD SAUNDERS (deceased), MARGARET
A. SAUNDERS, DOUGLAS W. SAUNDERS,
PHYLLIS SAUNDERS (deceased), MELISSA P. SMITH,
NANCY KING ANDREWS STETSON TRUST,
JOSEPHINE B. TAYLOR, RICHARD S. THURBER,
HARRY R. THURBER, JR. (deceased), SUSAN W.
THURBER LIVING TRUST, ROBIN TUNSTALL
JOHNSON TUCK, JAMES JOHNSON TUCK, AGENT,
EMMI (EMMA) T. WYATT (deceased), and SNOWDEN
WYATT, or these Defendants' heirs or devisees or
successor trustees or agents,

Defendants.

¹ CGAS Properties, L.L.C. being the purported successor of EnerVest Operating, L.L.C.



ORDER

DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT ORDER PURSUANT TO RULES 59 AND 52

Motion and Related Pleadings

Pending before this Court is *Plaintiffs' Motion To Alter Or Amend Judgment Order Pursuant To Rules 59 And 52* filed herein on March 7, 2017 by and through their legal counsel. Such parties request this Court pursuant to Rules 59 and 52 (particularly including Rules 59(e) and 52(b)) of the *West Virginia Rules of Civil Procedure*,

...to alter, amend or modify its *Omnibus Order* entered on February 21, 2017 so that it includes the necessary findings of fact set forth therein as they are necessary and accurate based on the Record before this Court and as a result of the inclusion of such findings of fact, to modify this Court's conclusions of law as are apparent and requested herein. Further, this Court should grant Plaintiff L&D's Motion as set forth in Paragraph 11 above or retain such matter on the docket until it is finally ruled upon.

(See Motion, p. 6 at ¶ 1).

Plaintiffs' Motion advances eleven separate "grounds" upon which this Court is requested to change its *Omnibus Order*, to-wit: five (5) separate and additional findings of fact (See *Id.*, pp. 1 – 3 at enumerated items 1) through 5)); four (4) separate and additional findings as a matter of law (See *Id.*, pp. 4 – 5 at enumerated items 6), 7), 9) and 10)); one (1) separate and additional inclusion of a conclusion of law (See *Id.*, p. 4 at enumerated item 8)), and one (1) separate and additional ruling particular only to Defendant, L&D Investments, Inc., and its Motion for Partial Summary Judgment concerning claims of unauthorized pooling which included a separate, similar claim for unrelated mineral property having nothing to do with the "Subject Property" at issue herein (See *Id.*, pp. 5 – 6 at enumerated item 11)).

Without benefit of any Response Scheduling Order from this Court, *Defendant Mike Ross, Inc.'s Objection To Plaintiffs' Motion To Alter Or Amend Judgment Order* was filed herein on March 13, 2017. Such Defendant objects to Plaintiffs' Motion and avers *inter alia* that: (a) no new facts or arguments are advanced in such Motion; (b) Plaintiffs advance only the same facts and arguments already considered by this Court in making its rulings contained in the *Omnibus Order*; and, (c) as reiterated, applicable Statute of Limitations bar Plaintiffs' claims.

This Court received courtesy copies of such Motion and Objection respectively provided by Plaintiffs' and Defendant, Mike Ross, Inc.'s, legal counsel.

Conclusion

Having further reviewed and considered such pleadings, its *Omnibus Order* and pertinent parts of the record herein related all thereto, this Court undertook additional deliberations all thereon. It was determined that no additional responsive pleadings from the parties herein were necessary as such record and pleadings are deemed sufficient upon which this Court may rule.

Accordingly, this Court concludes that *Plaintiffs' Motion to Alter Or Amend Judgment Order Pursuant To Rules 59 And 52* should be DENIED upon the entirety of the evidentiary and pleading record presented herein and upon which its *Omnibus Order* was entered as well as pertinent discussion and analysis made *infra*.²

² This Court notes that the underlying record herein, since entry of its *Omnibus Order* reflects further pleadings being filed, to-wit: (a) *Plaintiffs' Response To Court's Directive* filed herein on March 3, 2017; (b) a copy of Defendant, Robert Hitzelberger's, *Supreme Court Of Appeals Of West Virginia Notice Of Appeal* (filed therein on March 23, 2017) filed herein on March 27, 2017; and (c) a copy of *Motion Of Party Plaintiffs Demonstrating Interest In Current Appeal Pursuant To Rule 5(c) And Request For Abeyance Pursuant To Rule 28(f)* with Exhibit 1, that being a copy of Plaintiffs' pending Motion to Alter or Amend, (submitted to the Clerk of the Supreme Court of Appeals of West Virginia under cover letter dated April 3, 2017) filed herein on April 4, 2017.

Standard of Review

With regard to any motion to alter or amend a judgment, Rule 59(e) of the *West Virginia Rules of Civil Procedure* states, "Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment."

Subdivision (e) provides the procedure for a party who seeks to change or revise a judgment entered as a result of a motion to dismiss or a motion for summary judgment. *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995); *Moore v. St. Joseph's Hosp. of Buckhannon, Inc.*, 208 W. Va. 123, 538 S.E.2d 714 (2000).

Where a court, by an order in the first instance, disposes of multiple claims and adjudicates all controversies, but a party by a subdivision (e) motion asks the court to alter or amend the order as to one of the claims, but not the other, the subdivision (e) motion extends the time of finality of the order as it relates to the claim contained in the subdivision (e) motion until that motion is determined, but the order in the first instance is final as to the other claims determined therein, and the time for appeal as to that claim runs from the entry of the order in the first instance. *Dixon v. American Indus. Leasing Co.*, 157 W. Va. 735, 205 S.E.2d 4 (1974); *Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 158 W. Va. 708, 214 S.E.2d 823 (1975); *James M.B.*

With regard to amending findings by the Court, Rule 52(b) of such Rules states, in pertinent part, that:

[U]pon a party's motion filed not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. ... When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.

Discussion and Analysis

This Court hereby provides the following discussion and analysis in support of its conclusion and ruling herein, to-wit:

1. In proper temporal keeping with Rule 6(a) of such Rules, this Court deems Plaintiffs' pending Motion timely filed pursuant to the mandatory time parameters contained in Rule 52(b) and Rule 59(e).

2. This Court deems Plaintiffs' averred grounds for amending or otherwise modifying findings, conclusions and rulings contained in its *Omnibus Order* substantively inadequate for purposes of establishing sufficient good cause and, thereby, fail to convince this Court to make these additional findings or conclusions and amending such Order:

(a) Multiple grounds rely upon specified documents included in the "Parties Submitted Documents Stipulated as Authentic" that were heretofore filed herein, fully reviewed and considered at the time of this Court's *Omnibus Order* that made findings, conclusions and ultimate rulings under Rule 56 and Rule 57 of the *West Virginia Rules of Civil Procedure* in the underlying declaratory judgment action initiated and pursued by the collective parties herein of record concerning the ownership interests in and to certain mineral interests in and underlying the "Subject Property".

(b) Other ground(s) further rely upon convincing this Court to make additional findings completely contrary to those made or previously determined by it to be insufficiently supported by the record as to applicable notice provisions and efforts made in satisfaction thereof that were addressed or intentionally excluded by this Court and, thereby, appropriately reflected in its *Omnibus Order*.

(c) A final ground being a separate claim deemed similarly sufficient by Plaintiff, L&D Investments Inc., for purposes of inclusion in this civil action that this Court must either reverse its related rulings contained in its *Omnibus Order* or otherwise amend so that such separate claim may be maintained on this Court's docket for further proceedings. This Court may so act but, it won't.

3. This Court deems its *Omnibus Order*, particularly as to its findings and conclusions and ultimate rulings in declaration and otherwise, to fully speak for itself in finality. Furthermore, its findings and conclusions stated therein are sufficient in dispositive and declaratory proportion to and support of this Court's rulings in totality.

4. No such other amendments or modifications of any findings, conclusions or rulings therein were proffered or otherwise timely requested by any other party litigant herein.

5. Plaintiffs, collectively and individually, have sufficient recourse on appeal to further address such findings and conclusions deemed necessary in attacking the final dispositive and declaratory rulings this Court made in its *Omnibus Order* in effectuating a quieting of title to the "Subject Property" and determining the viability, or non-viability, of any related claims, cross-claims or counterclaims.

Ruling

Accordingly, this Court hereby **ORDERS** that *Plaintiffs' Motion To Alter Or Amend Judgment Order Pursuant To Rules 59 And 52* be and is **DENIED**.

Having so ruled, this Court *sua sponte* **ORDERS** that Plaintiffs be and are each respectively **GRANTED** appropriate objections and exceptions thereon for all further appellate purposes.

Finally, this Court DIRECTS the Clerk of this Court to provide and/or otherwise send certified copies of this Order to the following legal counsel of record and clerk:

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*Counsel for Defendant Antero
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Counsel for Robert Hitzelberger

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(now properly CGAS Properties, L.L.C.)
and SWN Production Company, LLC*

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*Counsel for Wyatt and Donovan
Defendants (descendants)*

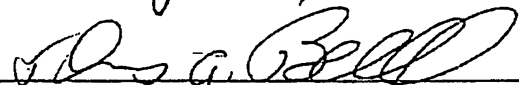
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Living Trust & H. R. Thurber (deceased)*

Sharon Z. Hall, Esq.
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Counsel for Saunders Defendants

Rory L. Perry, II, Clerk
Supreme Court of Appeals of West Virginia
1900 Kanawha Boulevard, East
Room E-317
Charleston, WV 25305

ENTER: April 25, 2017

THOMAS A. BEDELL, Chief Judge

STATE OF WEST VIRGINIA

COUNTY OF HARRISON, TO-WIT

I, Albert F. Marano, Clerk of the Fifteenth Judicial Circuit and the 18th Family
Court Circuit of Harrison County, West Virginia, hereby certify the foregoing
to be a true copy of the ORDER entered in the above styled action on the

5 day of April, 2017.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the

Seal of the Court this 5 day of April, 2017.

Albert F. Marano

rm

Fifteenth Judicial Circuit & 18th

Family Court Circuit Clerk

Harrison County, West Virginia